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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 340.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ALICE LEONORA CLEMENTS AND HENRY Q. CLEMENTS, HER HUSBAND.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED MARCH 7, 1888.

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a UNITED STATES OF AMERICA, *sct:*

The President of the United States to the judges of the circuit court of the United States for the western division of the western district of Missouri, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Alice Leonora Clements and Henry Q. Clements, her husband, and The Equitable Life Assurance Society of the United States, a manifest error hath happened, to the great damage of the said The Equitable Life Assurance Society of the United States, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court.

Issued at office, in Kansas City, this 12th day of January, A. D. 1888.

WARREN WATSON, *Clerk,*
By —— ——, *D. C.*

Allowed.

AMOS M. THAYER,
Dist. Judge.

b [Endorsed:] United States circuit court, western district of Missouri, western division. Alice L. Clements & husb. *vs.* Eq. Life Ins. Society. Writ of error. Filed January 12, 1888. Warren Watson, clerk.

WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *sct:*

I do hereby return due and perfect obedience to the within writ, and do herewith, under the seal of said circuit court, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same.

Seal of the United States Circuit Court for the Western District of Missouri, Western Division.

Witness my hand as clerk and the seal of said court.

Issued at office, in Kansas City, this fifteenth day of February, A. D. 1888.

WARREN WATSON, *Clerk,*
By —— ——, *Deputy Clerk.*

c UNITED STATES OF AMERICA, *sct:*

To Alice Leonora Clements & Henry Q. Clements, her husband, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western division of the western district of Missouri, wherein The Equitable Life Assurance Society of the United States — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Amos M. Thayer, acting judge of the circuit court of the United States for the western division of the western district of Missouri, this 12th day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

AMOS M. THAYER, *Judge.*

d [Endorsed:] United States circuit court, western district of Missouri, western division. Alice L. Clements & husb. *vs.* Eq. Life Ins. Society. Citation. Filed ——, 188–. ——, clerk.

UNITED STATES OF AMERICA, } *ss:*
Western District of Missouri, }

I hereby acknowledge due service of the within citation this twelfth day of January, A. D. 1888.

L. C. KRAUTHOFF,
Attorney for Defendant in Error.

e In the Supreme Court of the United States.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Plaintiff in Error, *vs.* HENRY Q. CLEMENTS and ALICE L. CLEMENTS, His Wife (Formerly Alice L. Wall), Defendants in Error.	To the October Term, 1888.

On error to the circuit court of the United States for the western district of Missouri (western division).

Assignment of Errors.

The said The Equitable Life Assurance Society of the United States, plaintiff in error in the above-entitled cause, comes and assigns the following errors committed by the said circuit court of the United States for the western district of Missouri (western division)

at the trial of said cause, to wit: The said circuit court erred at said trial in admitting, against the objection of the defendant therein, to wit, this plaintiff in error, immaterial and incompetent testimony offered by the defendants in error, plaintiffs below.

Said circuit court erred at said trial in refusing to grant proper instructions or declarations of law prayed for at said trial by the said plaintiff in error, defendant below.

The said court erred in overruling the motion for a new trial filed by the defendant below, plaintiff in error, and in refusing, as prayed in and by said motion, to set aside the verdict rendered in said cause and to grant to the defendant below a new trial thereto
f for the reasons set forth in said motion.

And this plaintiff further assigns for error the action and ruling of said circuit court in said cause in this, to wit, that as appears by the record in said cause the said circuit court sustained the motion made in said cause by Alice L. Clements, then Alice L. Wall, plaintiff therein, to strike out certain portions of the answer of the defendant below to the amended petition filed in said cause, and against the objection and exception of this plaintiff, to wit, the defendant below, thereto ordered the said portions of said answer to be stricken out.

HITCHCOCK, MADILL & FINKELNBURG,
Attorneys for said Plaintiff in Error (Defendant Celow).

g [Endorsed:] In the Supreme Court of the United States. The Equitable Life Assurance Society of the United States *vs.* Henry Q. Clements and Alice L. Clements, his wife, &c. Assignment of errors.

1 UNITED STATES OF AMERICA, *sct:*

Be it remembered that heretofore, to wit, on the 4th day of May, A. D. 1887, there was received and filed in the office of the clerk of the circuit court of the United States for the western division of the western district of Missouri a transcript of the orders, record entries, and proceedings had before the circuit court of the United States for the central division of the western district of Missouri in the cause wherein Alice Lenora Wall is plaintiff and The Equitable Life Assurance Society of the United States is defendant.

Said transcript is in words and figures as follows:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Central Division of the Western District of Missouri. November Term.

MONDAY, *November 17th*, 1884.

ALICE LENORA WALL
vs.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

This day there is filed herein a transcript of the record and pro-

ceedings; also petition and bond for removal of the above-entitled cause to this court, as certified from the circuit court of Henry county, Mo. It is thereupon ordered that said case be docketed.

Upon motion, this day also filed, leave is granted said defendant to file answer within thirty days from this date.

2 In Vacation.

WEDNESDAY, *December* 17*th*, 1884.

ALICE L. WALL
vs.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE U. S. } 1875.

This day there is received by mail and filed herein the answer of defendant.

Adjourned Term.

TUESDAY, *March* 17*th*, 1885.

ALICE L. WALL
vs.
EQUITABLE L. AS. SO. } (1875.)

Ordered that this case be continued until the next term of this court.

April Term.

WEDNESDAY, *April* 22*d*, 1885.

ALICE LENORA WALL
vs.
EQUITABLE LIFE ASSURANCE SOCIETY. } (1875.)

This day comes the defendant, by its attorney, Henry Hitchcock, Esq., and files motion requiring plaintiff to secure the costs herein.

April Term.

FRIDAY, *April* 24*th*, 1885.

ALICE LENORA WALL
vs.
EQUITABLE LIFE ASSURANCE SOCIETY, &c. } (1875.)

In pursuance of a stipulation this day filed, it is ordered that this case be continued until the next term of this court.

3 November Term.

MONDAY, *November* 16*th*, 1885.

ALICE L. WALL
vs.
EQUITABLE LIFE ASSURANCE SOCIETY, &c. } (1875.)

This day comes the plaintiff, by her attorney, L. C. Krauthoff,

Esq., and files demurrer to the answer of defendant heretofore filed herein.

November Term.

WEDNESDAY, *November* 18*th*, 1885.

ALICE LENORA WALL
vs.
EQUITABLE LIFE ASSURANCE SOCIETY, &c. } (1875.)

This day come the parties, by their respective attorneys—the plaintiff by Messrs. Fyke and Krauthoff, and the defendant by Henry Hitchcock, Esq.; thereupon the demurrer heretofore filed to the answer of defendant was argued by counsel and submitted. On consideration whereof it is ordered by the court that said demurrer be, and the same is hereby, overruled. Plaintiff then comes, and on her motion leave for thirty days is granted said plaintiff within which to file an amended petition herein. By consent of parties it is ordered that this case be now continued until the next term of this court.

November Term.

THURSDAY, *November* 19*th*, 1885.

ALICE LENORA WALL
vs.
EQUITABLE LIFE ASSURANCE SO., etc. }

4 This day comes the defendant, by its attorney, Henry Hitchcock, Esq., on whose motion it is ordered that the continuance entered herein on yesterday be set aside; and, the motion heretofore filed for an order for plaintiff to secure costs in this case being submitted, it is thereupon ordered that said motion be sustained, and that the plaintiff within thirty days from yesterday, the 18th inst., file a bond in the sum of $200, to secure the costs in this case, said bond to be approved by the clerk of this court. On motion, it is ordered that defendant have leave to plead to the amended petition until the first Monday in March next. Ordered that this case be now continued until the next term of this court.

In Vacation.

SATURDAY, *December* 12*th*, 1885.

ALICE L. WALL
vs.
EQUITABLE LIFE ASSU. SO., etc. } (1875.)

This day comes plaintiff, by her attorney, L. C. Krauthoff, Esq., and files her amended petition herein.

In Vacation.

TUESDAY, *February 9th*, 1886.

ALICE LENORA WALL
vs.
EQUITABLE LIFE ASSURANCE SOCIETY.

This day there is received and filed herein defendant's answer to plaintiff's amended petition, and endorsed thereon the following: "We consent to filing hereof Feb. 9, 1886. Fyke, Smith & Krauthoff, for pl'ff."

Adjourned Term.

TUESDAY, *March 2d*, 1886.

ALICE LENORA WALL
vs.
EQUITABLE LIFE ASSURANCE SOCIETY.

This day comes the plaintiff, by her attorney, J. L. Smith,
5 Esq., and files motion to strike out parts of defendant's answer.

Adjourned Term.

THURSDAY, *March 18th*, 1886.

ALICE L. WALL
vs.
EQUITABLE LIFE ASSU., etc.

Ordered that this case be now continued until the next term of this court.

Adjourned Term.

THURSDAY, *September 23d*, 1886.

ALICE LENORA WALL
vs.
EQUITABLE LIFE ASSU. CO.

In pursuance of an agreement this day filed it is ordered that this case be now continued until the next term of this court.

Adjourned Term.

FRIDAY, *March 25th*, 1887.

ALICE LENORA WALL
vs.
EQUITABLE LIFE ASSU., etc.

This day there is received and filed herein a stipulation of parties transferring this case to the western division of this district. It is thereupon ordered that the clerk of this court make a duly certified transcript of all record entries in this court in this cause and trans-

mit the same, together with the papers filed herein, to the clerk of the U. S. circuit court for the western division of the western district of Missouri.

6 UNITED STATES OF AMERICA, } *sct:*
Central Division of the Western District of Missouri, }

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for central division of said district, do hereby certify that the foregoing writing is a true transcript of the orders, record entries, and proceedings in case Alice Lenora Wall against The Equitable Life Assurance Society of the United States as fully as the same are of record in my office; and I further certify that the files herewith transmitted are all the original papers in said cause.

In testimony whereof I have hereunto subscribed my
[SEAL.] name and affixed the seal of said court, at office, in the city of Jefferson, in said district, this 2nd day of May, 1887.

H. C. GEISBERG, *Clerk.*

Said transcript from the circuit court of Henry county is in words and figures as follows:

STATE OF MISSOURI, }
County of Henry. }

Be it remembered that on this 15th day of August, 1884, comes Alice Lenora Wall and files herein the following petition against the Equitable Life Assurance Society of the United States, in words and figures as follows, to wit:

STATE OF MISSOURI, }
Henry County, }

In the Circuit Court. September Term, 1884.

ALICE LENORA WALL, Pl'ff,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Def't.

7 Plaintiff, for cause of action, states that defendant is a corporation duly incorporated under the laws of the State of New York for the purpose of doing a life insurance business, and has power to issue policies of insurance on persons' lives and to sue and be sued. Plaintiff alleges that heretofore, to wit, on the 23d day of December, 1880, in consideration of the sum of one hundred and thirty-six and $\frac{25}{100}$ dollars to defendant paid by Samuel E. Wall, and in consideration of the further agreement on the part of said Samuel E. Wall to pay to defendant an annual premium of one hundred and thirty-six and $\frac{25}{100}$ dollars, payable on or before December 15th in each year during the continuance of the contract, the said defendant made, executed, and delivered to said Samuel E. Wall its contract or policy of insurance, which is herewith filed, by the terms

whereof the said defendant, in consideration of the payment and agreement aforesaid on the part of said Samuel E. Wall, did promise to pay to Alice Lenora Wall, wife of Samuel E. Wall, for the sole use of living, the sum of five thousand dollars within sixty days after satisfactory proofs of the death of said Samuel E. Wall should be furnished to defendant at its office in New York city. Plaintiff alleges that said Samuel E. Wall paid the annual premiums for the years 1881, 1882, and 1883, in addition to the premium paid at the time said policy was issued; that on the — day of January, 1884, and during the continuance of said contract of insurance said Samuel E. Wall died; that soon after the death of said Samuel E. Wall and, to wit, on the — day of January, 1884, plaintiff notified defendant of the death of said Samuel E. Wall, which notice was duly received by defendant; that no formal proofs of death have been made for the reason that defendant has denied and still denies all liability under said policy whereby defendant has waived any
8 other or further proofs of the death of said Samuel E. Wall.

Plaintiff alleges that she and the said Samuel E. Wall have complied with all the conditions of said contract on their part.

Plaintiff alleges that she was the wife and is now the widow of said Samuel E. Wall.

Plaintiff says that by reason of the premises the said defendant has become and is indebted to her in the sum of five thousand dollars, for which, with costs, she asks judgment.

FYKE AND CALVIRD & T. O. WILLIAMS, *Att'ys.*

Filed Aug. 15th, 1884.

R. B. McCONNELL, *Clerk.*

Summons.

STATE OF MISSOURI, } *ss:*
County of Henry, }

In the Circuit Court.

The State of Missouri to the sheriff of city of St. Louis, Greeting:

We command you to summon the Equitable Life Assurance Society of the United States, if it be found in your city, to appear before our circuit court to be holden within and for the county of Henry, at the court-house, in the city of Clinton, in said county, on the first day of the next term thereof, to be begun and held on the second Monday in September, A. D. 1884, then and there, before the judge of our said court, to answer the petition of Alice Lenore Wall; and have you then and there this writ, with the return of your action thereon.

Witness my hand as clerk of our said court and the seal thereof.

Done at office, in Clinton, in the county aforesaid, on the 16 day of August, A. D. 1884.

R. B. McCONNELL,
Circuit Clerk.

9 *Sheriff's Return.*

Executed the within writ, in the city of St. Louis, State of Missouri, on the 20th day of August, A. D. 1884, by delivering a copy of the writ and petition as furnished by the clerk of the Henry county circuit court to J. S. Kendrick, the person authorized by the written instrument or power of attorney of The Equitable Life Assurance Society of the United States, the defendant named within, duly signed and sealed and filed with the superintendent of the insurance department of Missouri, to receive service of process for and in behalf of said company in this State.

ISAAC M. MASON,
Sheriff of the City of St. Louis,
By CHAS. McCUNE, *Deputy.*

Fee, $1.00, paid by pl'ff's att'ys.

STATE OF MISSOURI, }
County of Henry. }

Be it remembered that at a regular term of Henry county circuit court, begun and held at the court-house, in the city of Clinton, Henry county, Missouri, on the 2nd Monday of September, 1884, it being the 8th day of said month of September—present, James B. Gannt, judge; A. B. Hopkins, sheriff; R. E. Lewis, prosecuting attorney, and R. B. McConnell, clerk—when and where the following proceedings were had, to wit:

ALICE LENORE WALL, Pl'ff,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Def't.

Now, at this day, comes the said defendant and files herein its petition showing that the matter and amount involved in
10 cause exceeds, exclusive of cost, the sum of five thousand dollars, and that the controversy in said suit is between citizens of different States, and the petitioner was at the time of the commencement of this suit and still is a citizen of the State of New York, and that the plaintiff was then and still is a citizen of the State of Missouri, and praying a removal of this cause to the circuit court of the United States within and for the western district of Missouri and the eastern division thereof; and it appearing to the court that said averments in said petition are true, and the said petitioner having filed its bond, with sufficient security, in the penal sum of five thousand dollars, conditioned as the law required, which is approved by the court—

It is therefore ordered by the court that this case be removed into said circuit court of the United States within and for the western district of Missouri and the eastern division thereof according to the statute in such cases made and provided.

STATE OF MISSOURI, } ss:
County of Henry, }

In the Circuit Court of Henry County.

ALICE LENORE WALL, Plaintiff,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant.

Petition for Removal by Non-resident.

To the honorable the circuit court of Henry county, State of Missouri:

Your petitioner, the defendant in above cause, respectfully shows that the matter and amount involved in the above-entitled cause exceeds, exclusive of costs, the sum or value of five hun-
11 dred dollars.

Your petitioner further shows that the controversy in said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is a citizen of the State of New York, and that plaintiff in above cause was then and still is a citizen of the State of Missouri.

And your petitioner offers herewith a bond, with good and sufficient surety, in the penal sum of five hundred dollars, conditioned for his entering in the circuit court of the United States for the western district of Missouri, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States for the western district of Missouri, eastern division, according to the statute in such case made and provided.

And your petitioner will ever pray, etc.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE U. S.,
By SAM'L BORROWS, 2. *V. P.*

HITCHCOCK, MADILL & FINKELNBURG &
R. C. McBETH,
Attorneys for Petitioner.

12 STATE OF NEW YORK, } ss:
New York County, }

SAMUEL BORROWS, being duly sworn, on oath deposes and says that he is the second vice-president of The Equitable Life Assurance Society of the United States, the defendant in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof, and that the matters and things therein stated are true, as he verily believes.

SAM'L BORROWS, 2 *V. P.*

Subscribed and sworn to by said Samuel Borrows this second day of September, A. D. 1884, before me—

[SEAL.] CORNELIUS C. WHITE,
Notary Public for the City and County of New York, No. 28.

Commissioned in March, 1885; term to expire Mar. 30, 1885.

Know all men by these presents that we, The Equitable Life Assurance Society of the United States, as principal, and T. W. Collins, of Henry, in the county of —— and State of Missouri, as surety, are held and firmly bound unto Alice Lenore Wall in the penal sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves and our heirs, executors, or administrators, jointly and severally and firmly, by these presents.

Witness our hands and seals this second day of September, A. D. 1884.

The condition of this obligation is such that if the above-bounden Equitable Life Assurance Society of the United States shall
13 enter and file or cause to be entered and filed in the next circuit court of the United States in and for the western district of Missouri, eastern division, on the first day of its next session, copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the circuit court of Henry county, State of Missouri, in which said Alice Lenore Wall is plaintiff and said Equitable Life Assurance Society is defendant, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court, then this obligation to be void; otherwise of force.

[SEAL.] THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE U. S.,
By SAM'L BORROWS, 2 *V. P.* [SEAL.]
T. W. COLLINS. [SEAL.]

STATE OF MISSOURI, *County of Henry,* } *ss:*

I, R. B. McConnell, clerk of the circuit court within and for the county of Henry and State aforesaid, do hereby certify the above and foregoing to be a true copy of the proceedings in the above-entitled cause, wherein Alice Lenore Wall is plaintiff and The Equitable Life Assurance Society of the United States is def't, composing copy of petition & proper return thereon, record entry, and also attached thereto is original bond for removal of cause and original petition for removal by non-resident.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed seal of said court, at office, in city of Clinton, this 14th day November, A. D. 1884.

R. B. McCONNELL, *Cir. Clerk.*

Said insurance policy is in the words and figures following, to wit:

14 The Equitable Life Assurance Society

Premium, $136.25. (Cut.) Amount, $5,000.

of the United States,

Age, 36. No. 227,711.

120 Broadway, New York.

Vice-president, James W. Alexander; president, Henry B. Hyde; actuary, George W. Phillips; assistant secretary, William Alexander; secretary, Samuel Borrowe.

In consideration of the application for this policy of insurance and of each of the statements made therein;

And in further consideration of the payment of the sum of one hundred and thirty-six dollars and twenty-five cents, at the office of the society in the city of New York, at the date hereof, the receipt whereof is hereby acknowledged, and of the annual payment of one hundred and thirty-six dollars and twenty-five cents, to be made at the said office on or before the fifteenth day of December in every year during the continuance of this contract—

Does promise to pay to Alice Lenora Wall, wife of Samuel E. Wall, for her sole use, if living, in conformity with the statute, and, if not living, to the children of said Samuel E. Wall or their guardian for their use; or if there be no such children surviving, then to the executors, administrators, or assigns of said Samuel E. Wall, the sum of five thousand dollars (any indebtedness to the society on account of this contract to be first deducted therefrom), at the office of the society in the city of New York, within sixty days after
15 satisfactory proofs of the death of said Samuel E. Wall, of Windsor, in the county of Henry, State of Missouri, shall have been furnished to the society at its said office.

And the said society does hereby further promise and agree that after three years from the date hereof the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums at the times and place and in the manner stipulated, and that the regulations of the society as to age, residence, travel, occupation, and employments shall be observed, and that in all other respects, after the expiration of said three years, the liability of the said society under this policy shall not be disputed.

And, further, that if premiums upon this policy for not less than three complete years of assurance shall have been duly received by said society and this policy should thereafter become void in consequence of default in payment of a subsequent premium, said society will issue in lieu of such policy a new paid-up policy, without participation in profits, in favor of said Alice L. Wall, if living, and, if not living, to the children of said Samuel E. Wall or their guardian for their use, or if there be no children surviving, then to the executors, administrators, or assigns of said Samuel E. Wall for the entire amount which the full reserve on this policy, according to the present legal standard of the State of New York, will then purchase as a single premium, calculated by the regular table for single-premium

policies now published and in use by the society: Provided, however, that this policy shall be surrendered, duly receipted, within six months of the date of default in payment of premium as mentioned above.

This policy is issued and accepted upon the condition that the provisions and requirements printed or written by the society upon the back of this policy are accepted by the assured as part of
16 this contract as fully as if they were recited at length over the signatures hereto affixed.

In witness whereof the Equitable Life Assurance Society of the United States has caused this policy to be signed by its president and secretary, at the office in the city of New York, the twenty-third day of December, A. D. one thousand eight hundred and eighty.

Examined by—

G. W. PHILLIPS,
Act'g President.

W. ALEXANDER, *Secretary.*

For a wife.
G. 30.

No person except the president, vice-president, actuary, secretary, or assistant secretary is authorized to make, alter, or discharge contracts or waive forfeitures.

Provisions and Requirements Referred to in This Policy.

1. The limits of travel and residence allowed under this contract include this part of the settled limits of the United States and British possessions which lie between the parallels of 50° and 36° 30′ north latitude; also that part of Tennessee which lies east of the Tennessee river; also those parts of Alabama, Georgia, South Carolina, and North Carolina which lie north of the parallel of 34° north latitude, and at the same time more than 100 miles from the Atlantic coast; also all the places within fifty miles of Atlanta, Georgia; also the settled limits of the United States which lie between the 100th and 109th degrees west longitude, and at the same time north of the parallel 32° north latitude; also all the settled limits of the United States which lie west of the 109th meridian of west longitude, except Alaska; also all of Europe; also, before July 1st and
16½ after November 1st in any calendar year, those parts of the settled limits of the United States which lie south of the parallel of 36° 30′ north latitude, travel is permitted in first-class vessels, by direct route, along the coast of the United States and British North American possessions, and between Europe and said British possessions and the United States, provided no port is entered not included at the time in the limits above allowed for travel and residence; but travel and residence of the person at whose death this contract matures beyond the above limits or at other seasons than are above stated, without permission in writing signed by one of the officers of the society as designated below, is prohibited.

2. Engagement by the person upon whose death this contract

matures in any of the following occupations or employments without permission in writing, signed by one of the officers of the society as designated below, is prohibited: Blasting, mining, submarine labor, aeronautic travel and excursions, the manufacture, handling, or transportation of inflammable or explosive substances, service upon any railroad, steamboat, or other vessel or boat, military and naval service of every kind, whether as combatant or non-combatant, the militia in time of peace excepted.

3. Self-destruction and death in consequence of a duel or of the violation of the law, within three years from the date hereof, are not risks assumed by the society in this contract.

4. All premiums are due in the city of New York, at the date named in the policy; but at the pleasure of the society suitable persons may be authorized to receive such payments at other places, but only on the production of the society's receipt therefor, signed by the president, vice-president, actuary, secretary, or assistant secretary and countersigned by the person to whom the payment is made.

17 No payment made to any person except in exchange for such receipt will be recognized by the society. All premiums are considered payable annually in advance; when the premium is made payable in semi-annual or quarterly instalments that part of the year's premium, if any, which remains unpaid at the maturity of this contract shall be regarded as an indebtedness to the society on account of this contract, and shall be deducted from the amount of the claim, and if any premium or instalment of a premium on this policy shall not be paid when due this policy shall be void; nevertheless nothing herein shall be construed to deprive the holder of this policy of the privilege to demand and receive paid-up insurance in accordance with the agreement contained in this policy.

5. The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together, and none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing, signed by the president, vice-president, actuary, secretary, or assistant secretary of the society, whose authority for this purpose will not be delegated.

6. If any statement made in the application for this policy be in any respect untrue this policy shall be void and all payments which shall have been made to the society on account of this contract shall belong to and be retained by the society: Provided, however, that discovery of the same must be made by the society and notice thereof given to the assured within three years from the date hereof.

7. This policy, during its continuance, shall be entitled to participate in the distribution of the surplus of this society, by way

18 of increase to the amount insured, according to such principles and methods as may from time to time be adopted by this society for such distribution, which principles and methods are hereby ratified and accepted by and for every person who shall have any claim or interest under this contract; but the society may at any time before a forfeiture, upon request of the person holding the absolute legal title to this policy, substitute a cash payment, to be

fixed by said society, in lieu of the said increase to the amount insured, to be used in reduction of subsequent premiums.

8. The age of the person upon whose death this contract matures will be admitted to the society on due proof, but if not so admitted the amount of insurance payable under this policy at its maturity shall in no case be more than the premium charged would have purchased by the society's rates in use at the register date hereof for such person's true age.

Said policy is endorsed as follows: No. 227,711. The Equitable Life Assurance Society of the United States, 120 Broadway, N. Y. Assurance on life of Samuel E. Wall. Amount, $5,000; term, life. First payment, $136.25; policy, $1—$137.25. A premium due 15th Dec. $136.25. Register date of policy, Dec. 15, 1880.

19 Said answer is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western District of Missouri (Eastern Division). November Term, 1884.

ALICE LENORE WALL, Plaintiff,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant.

Now comes the defendant above named, The Equitable Life Assurance Society of the United States, and, for its answer to the petition of the plaintiff above named, says:

That it admits that it is a corporation as alleged, and also admits that it, said defendant, on December 23, 1880, executed a policy of insurance on the life of Samuel E. Wall, whereby defendant, for the considerations respectively in said policy stated, and not otherwise, promised to pay to Alice L. Wall, wife of Samuel E. Wall, for her sole use, if living, the sum of ($5,000) five thousand dollars (after first deducting therefrom any indebtedness to the society on account of said contract), at the office of the society in the city of New York, within sixty days after satisfactory proofs of the death of said Samuel E. Wall, of Windsor, in the county of Henry, in the State of Missouri, shall have been furnished to said society, this defendant, at its said office.

Whether the instrument filed with the petition in this cause is said original policy of insurance defendant has not knowledge
20 or information sufficient to form a belief, and craves inspection of said instrument when produced at the trial of said cause; whether or not said Samuel E. Wall departed this life as alleged defendant has not knowledge or information sufficient to form a belief; but defendant denies that at any time during the month of January, 1884, said contract of insurance was or continued to be in force, and avers on the contrary that under the terms of said contract and by reasons of the default hereinafter mentioned this defendant was before the first day of January, A. D. 1884, discharged and released from any liability thereunder.

But defendant denies that either this plaintiff or the said Samuel E. Wall have complied with all the conditions of said contract on their part, and especially denies that said Samuel E. Wall or any other person has paid to the defendant or for its use, at the time and in accordance with the conditions prescribed in said policy of insurance, the annual premium therein reserved and made payable on or before the 15th day of December, in the year eighteen hundred and eighty-three; but defendant says that by reason of said default in payment of said annual premium last mentioned, in accordance with the terms of said contract, defendant was not nor is liable to pay to said plaintiff the said sum of $5,000 or any part thereof.

And, having fully answered, defendant prays to be hence dismissed with its costs.

HITCHCOCK, MADILL & FINKELNBURG.

Said demurrer is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri.

ALICE L. WALL, Plaintiff,
vs.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant. } No. 1875.

21 The said plaintiff comes now and demurs to the answer of the defendant herein, except the denial of Wall's death and the general denial of a failure to comply with all the conditions of the policy sued on, and for grounds of such demurrer assigns the following:

1. That said answer sets forth no facts constituting a defence herein.

2. That under the pleadings, the terms of the policy sued on, and the provisions of the statutes of the State of Missouri the alleged failure to pay the premium on said policy, as alleged in said answer, did not forfeit the same, as averred, nor does such alleged failure constitute any defence, but the said policy was and remained in full force at the date of the death of the assured.

Wherefore plaintiff prays judgment, &c.

M. A. FYKE & SMITH & KRAUTHOFF, *For Plaintiff.*

Said amended petition is in words and figures as follows:

In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri.

ALICE L. WALL, Plaintiff,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant. } No. 1875.

Amended Petition.

The plaintiff, for amended petition, states that defendant is a cor-

poration duly created and existing under the laws of the
22 State of New York for the purpose of doing a life insurance business, and has power to issue policies of insurance on the lives of persons.

Plaintiff alleges that heretofore, to wit, on the 23rd day of December, 1880, in consideration of the sum of one hundred and thirty-six dollars and twenty-five cents, to the defendant paid by Samuel E. Wall, and in consideration of the further agreement on the part of the said Samuel E. Wall to pay to the defendant an annual premium of $136.25, payable on or before the 15th day of December in each year during the continuance of the contract, the said defendant made, executed, and delivered to said Samuel E. Wall its contract and policy of insurance, which is herewith filed, by the terms whereof the said defendant, in consideration of the payment and agreement aforesaid on the part of said Samuel E. Wall, did promise and agree to pay to the plaintiff, Alice Lenora Wall, the wife of the said Samuel E. Wall, for her sole use, if living, the sum of five thousand dollars, within sixty days after satisfactory proofs of the death of said Samuel E. Wall should be furnished to defendant at its office in New York city.

Plaintiff alleges that said Samuel E. Wall paid the annual premiums on the said policy for the years 1881 and 1882, in addition to the premium paid at the time said policy was issued, and that on the 21st day of December, 1883, he caused to be paid to the proper officer of the defendant the premium which became due on the 15th day of said month; that said officer accepted the same and thereby waived the six days' delay in making the said payment, and by virtue of which payment the said policy became and was in force
for a period extending to the 15th day of December, 1884;
23 that on the 21st day of January, 1884, and during the continuance of said policy and while the same was in full force and effect, the said Samuel E. Wall died; that soon after the death of said Samuel E. Wall, to wit, on the 28th day of January, 1884, the plaintiff notified the defendant of the death of said Samuel E. Wall, which notice was duly received by defendant; that no formal proofs of such death have been made for the reason that the defendant has denied and still denies all liability under said policy, and has thereby waived any other, further, and formal proofs of the death of said Samuel E. Wall.

Plaintiff alleges that she and the said Samuel E. Wall have fully complied with all the conditions of said contract and policy on their respective parts.

Plaintiff alleges that she was the wife and is now the widow of the said Samuel E. Wall.

Plaintiff says that by reason of the premises the defendant has become and is indebted to her in the sum of five thousand dollars, with interest at the rate of six per centum per annum from said 21st day of January, 1884, and for which, with costs, she asks judgment against the defendant.

Second count.

For a second count the plaintiff states that the defendant is a corporation duly created and existing under the laws of the State of New York for the purpose of doing a life insurance business, and has power to issue policies of insurance on the lives of persons, and is doing business as a life insurance company in the State of Missouri and is subject to the laws of said State.

Plaintiff alleges that heretofore, to wit, on the 23rd day of December, 1880, in consideration of the sum of one hundred and
24 thirty-six dollars and twenty-five cents, to the defendant paid by Samuel E. Wall, and in consideration of the further agreement on the part of said Samuel E. Wall to pay to the defendant an annual premium of $136.25, payable on or before the 15th day of December in each year during the continuance of said contract, the said defendant made, executed, and delivered to said Samuel E. Wall, who was then and at all the times hereinafter mentioned a resident of the State of Missouri, and in which State the said policy was delivered and the said premiums paid, its contract and policy of insurance, which is herewith filed, by the terms of which the said defendant, in consideration of the payment and agreement aforesaid on the part of the said Samuel E. Wall, did promise and agree to pay to plaintiff, Alice Lenora Wall, the wife of the said Samuel E. Wall, for her sole use, if living, the sum of five thousand dollars within sixty days after satisfactory proofs of the death of said Samuel E. Wall should be furnished to defendant at its office in New York city.

Plaintiff alleges that the said Samuel E. Wall paid the annual premiums on said policy for the years 1881 and 1882, when due, in addition to the premium paid at the time when said policy was issued, making three full annual payments of premium; that by virtue of said three payments the said policy on said 15th day of December, 1883, had acquired a net value, and was on said day worth the sum of $161.05, as computed upon the American Experience Table of Mortality, with four and one-half per centum per annum interest; that neither the said Samuel E. Wall nor the plaintiff were at that time indebted to the defendant on account of any past premiums on said policy nor on any other account; that the age of said Samuel E. Wall at that time was 39 years; that three-fourths of such net value of said policy, applied and taken as net single premium for temporary insurance for the amount
25 written in said policy, entitled said Samuel E. Wall to a temporary insurance for said amount for a term expiring the 30th day of August, 1886, and the said policy was by reason of the premises and of the provisions of the statutes of the State of Missouri in such cases made and provided, kept and continued in full force and effect until said 30th day of August, 1886.

Plaintiff further states that on the 21st day of January, 1884, and during the term of said temporary insurance, and while the said policy thereunder was in full force and effect, the said Samuel E. Wall died; that soon after the death of said Samuel E. Wall, to

wit, on the 28th day of January, 1884, the plaintiff notified the defendant of the death of said Samuel E. Wall, which notice was duly received by defendant; that no formal proofs of such death have been made for the reason that the defendant has denied and still denies all liability under said policy, and has thereby waived any other, further, or formal proofs of the death of said Samuel E. Wall.

Plaintiff alleges that she and the said Samuel E. Wall have fully complied with all the conditions of said policy and contract on their respective parts.

Plaintiff alleges that she was the wife and is now the widow of said Samuel E. Wall.

Plaintiff says that by reason of the premises the defendant has become and is now indebted to her in the sum of five thousand dollars, with interest at the rate of six per centum per annum from said 21st day of January, 1884, and for which amount, with costs, she asks judgment against the defendant.

Third count.

For a third count the plaintiff states that the defendant is a corporation duly created and existing under the laws of the
26 State of New York for the purpose of doing a life insurance business, and has power to issue policies of insurance on the lives of persons, and is doing business as a life insurance company in the State of Missouri under the laws of said State.

Plaintiff alleges that heretofore, to wit, on the 23rd day of December, 1880, in consideration of the sum of one hundred and thirty-six dollars and twenty-five cents, to the defendant paid by Samuel E. Wall, and in consideration of the further agreement on the part of the said Samuel E. Wall to pay to the defendant an annual premium of $136.25, payable on or before the 15th day of December in each year during the continuance of said contract, the said defendant made, executed, and delivered to said Samuel E. Wall its contract and policy of insurance, which is herewith filed, by the terms of which the said defendant, in consideration of the payment and agreement aforesaid on the part of said Samuel E. Wall, did promise and agree to pay the plaintiff, Alice Lenora Wall, the wife of said Samuel E. Wall, for her sole use, if living, the sum of five thousand dollars, within sixty days after satisfactory proofs of the death of said Samuel E. Wall should be furnished to defendant at its office in New York city.

Plaintiff alleges that the said Samuel E. Wall paid the annual premiums on the said policy for the years 1881 and 1882, when due, in addition to the premium paid at the time said policy was issued, making three full annual payments of premium; that on the 15th day of December, 1883, there was due the said Samuel E. Wall from the defendant, by reason of dividends earned by and declared on said policy and the previous payments of premiums thereon as aforesaid, the sum of forty-six dollars; that at the time said contract of insurance was entered into between said par-
27 ties it was agreed that any dividends which might or should accrue upon said policy and any premiums paid thereon, if

permitted to remain in the hands of defendant, would be by it applied to the payment of any premiums that would thereafter become due on said policy, and the said defendant assured the said Samuel E. Wall and this plaintiff that so long as any such dividends remained in its hands the amount thereof would be by it applied to the payment of such premiums; and it was further agreed that the said Samuel E. Wall should have the right at any time to convert the amount so due to him into the payment of such premiums upon said policy, and that under the agreements aforesaid it was the duty of the defendant to so apply the said dividends to the payment of the premium falling due on the 15th day of December, 1883; that the said Samuel E. Wall did elect to convert and directed the defendant to convert and to apply the amount of the dividends so due him into such payment of a premium on said policy from and after said December 15th, 1883, and that by reason of such agreements, election, direction, conversion, and application the said policy became and was in full force until the first day of April, 1884.

Plaintiff further states that on the 21st day of January, 1884, and while the said policy was in full force and effect, the said Samuel E. Wall died; that soon thereafter, to wit, on the 28th day of January, 1884, the plaintiff notified defendant of the death of said Samuel E. Wall, which notice was duly received by it; that no formal proofs of such death have been made for the reason that the defendant has denied and still denies all liability under said policy, and has thereby waived any other, further, or formal proofs of such death.

Plaintiff alleges that she and the said Samuel E. Wall have
28 fully complied with all the conditions of said policy and contract on their respective parts.

Plaintiff alleges that she was the wife and is now the widow of said Samuel E. Wall.

Plaintiff says that by reason of the premises the defendant has become and is now indebted to her in the sum of five thousand dollars, with interest at the rate of six per centum per annum from the 21st day of January, 1884, and for which amount, with costs, she asks judgment against the defendant.

M. A. FYKE &
SMITH & KRAUTHOFF,
Attorneys for Plaintiff.

Said answer to the amended petition is in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
Western District of Missouri, } ss:

In the Circuit Court of the United States for the Western District of Missouri (Eastern Division).

ALICE L. WALL, Plaintiff,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant. } Law Cases. No. 1875.

The said defendant, answering the amended petition of said plaintiff in the above-entitled cause—

Admits that it is a corporation as alleged, and that defendant, on December 23rd, 1880, at the city and State of New York, executed a policy of insurance on the life of Samuel E. Wall, whereby, for the consideration and upon the conditions therein stated and
29 not otherwise, defendant promised to pay to Alice L. Wall, wife of Samuel E. Wall, for her sole use, if living, the sum of $5,000 (any indebtedness to said society on account of said contract to be first deducted therefrom), at the office of the society in the city of New York, within 60 days after satisfactory proofs of the death of said Samuel E. Wall shall have been furnished to the society at its said office.

Whether the instrument filed with said petition in this cause is the said original policy of insurance defendant has not knowledge or information sufficient to form a belief and craves inspection thereof, and for the further terms and conditions of said policy and contract by defendants thereby entered into prays leave to refer to said original instrument when the same shall be produced at the trial of this cause.

Whether said Samuel E. Wall died on the 21st day of January, 1884, as alleged, or at any and what date defendant has not knowledge or information sufficient to form a belief and requires proof thereof.

And for further answer to said amended petition, to wit, to the allegations contained in the first count thereof, this defendant—

Denies that on December 21st, 1883, or at any time, Samuel E. Wall or any person paid or caused to be paid to defendant or to any officer thereof the premium which became due under the terms of said policy on the 15th day of December, 1883.

Denies that defendant or any officer or agent thereof at any time accepted any money or other thing as or for payment of said premium which was due and payable to defendant on or before December 15th, 1883, or any part thereof.

Denies that defendant or any officer or other person there-
30 unto by defendant authorized at any time waived any delay or failure on the part of said Samuel E. Wall and of this plaintiff to pay said premium according to the terms and conditions of said policy or waived or released any right or forfeiture which by said failure to comply with the express conditions of said policy had accrued to this defendant.

Denies that by reason of anything in said petition alleged the said policy became or was in force at any time or for any period after December 15th, 1883.

On the contrary, defendant avers and states—

That in and by said policy it was, among other things, agreed and declared that said policy was issued and the defendant's promise therein was made in consideration as well of the application for said policy and of each of the statements made therein, and of the payment to defendant at the date of said policy, to wit, on December 23rd, 1880, of the sum of $136.25, as of the annual payment of $136.25, to be made at the office of the defendant in the city of New York on or before the 15th day of December in every year during the continuance of said contract.

That it was further in and by said policy agreed and provided, as an express condition thereof, that if any premium or instalment of a premium on said policy should not be paid when due said policy should be void.

That by the terms of said policy there became and was due and payable to defendant, as aforesaid, on or before the 15th day of December, 1885, as and for the third annual premium thereon, the sum of $136.25, but that said sum was not nor was any part thereof at any time paid to defendant or for its use to any person authorized to receive the same.

That by reason of the premises said policy became and was,
31 on and after the 15th December, 1883, wholly void, and defendant was released from all obligations thereunder.

Defendant denies that said policy was in force and effect at any time after December 15th, 1883.

Denies that notice of the death of Samuel E. Wall was duly received by defendant or that any proofs of the death of said Samuel E. Wall have ever been furnished to this defendant, or that it has in any manner waived the proof required by said policy or any other requirement thereof.

Denies that the conditions of said policy have been fully complied with; denies knowledge or information sufficient to form a belief whether the plaintiff in this action was the wife or is the widow of said Samuel E. Wall, and denies that defendant is indebted to plaintiff on any account or in any sum whatever.

Further answering said amended petition, to wit, the allegations contained in the second count thereof, this defendant admits—

That it is a corporation as alleged.

That defendant, on the 23rd day of December, 1880, at the city and State of New York, executed a contract in writing, being a policy of insurance on the life of Samuel E. Wall, whereby, for the considerations and upon the conditions therein stated and not otherwise, this defendant promised to pay to Alice L. Wall, wife of Samuel E. Wall, for her sole use, if living, in conformity with the statutes of the State of New York, the sum of $5,000 (any indebtedness to the society, to wit, this defendant, on account of said contract to be first deducted therefrom), at the office of the said society, this defendant, in the city of New York, to wit, in the State of New York, within

sixty days after satisfactory proofs of the death of said Samuel
32 E. Wall shall have been furnished to the society, to wit, this defendant, at its said office.

Whether the contract and policy of insurance filed with plaintiff's petition, as alleged, is the original policy of insurance executed by defendant, as above admitted, defendant has not knowledge or information sufficient to form a belief and craves inspection thereof when produced at the trial of this cause, and prays leave to refer to said original instrument by it executed for all and singular the terms and conditions of said contract.

But defendant avers that the contract or policy of insurance, the execution whereof by defendant is alleged in the first count of plaintiff's amended petition and is above admitted, and the contract or policy of insurance, the execution whereof by defendant is also averred in the second count of plaintiff's petition in this cause as amended and is also above admitted, are one and the same instrument and policy of insurance, and that defendant never executed or delivered to any person any contract or instrument purporting to insure the life of said Samuel E. Wall, except that one instrument or policy of insurance mentioned and referred to in said first count and also in said second count of said petition.

Further answering said second count or alleged cause of action, defendant admits that said Samuel E. Wall was a resident of the State of Missouri, and that said original instrument or policy of insurance, after being applied for, to, and executed by the defendant, as hereinafter stated, was, at the request of the said Wall, transmitted to the State of Missouri and was delivered to said Wall in said State.

But defendant states that said policy was executed for it, the said society, defendant, by the president and secretary thereof, at
33 the chief office of said defendant, in the city of New York, in the State of New York, under the laws of which State defendant is incorporated, and that by the terms of said policy the several annual premiums payable thereunder were agreed to be paid and were payable at the said office of the defendant in said State of New York and not elsewhere, it being, however, in said policy provided that at the pleasure of the said society, defendant, suitable persons might be authorized to receive such payments at other places, but only on the production of the society's receipt therefor, signed by the president, vice-president, actuary, secretary, or assistant secretary and countersigned by the person to whom such payment was made, and that no payment made to any person, except in exchange for such receipt, would be recognized by the society.

That by the said policy it was further provided that the said sum of $5,000, which, upon the conditions aforesaid and in said contract set forth and not otherwise, said society promised to pay to said Alice L. Wall, was to be paid if and when the same should become due and payable at the said office of this defendant in the city of New York and State of New York.

And defendant avers that the said contract of defendant, being so by it executed and so by it to be performed in the State of New

York, was a contract under and to be construed and governed by the laws of the said State of New York and not by the laws of any other State, nor was nor is said contract or defendant's obligation thereunder within the purview of any law of the State of Missouri touching policies of insurance on life nor subject to be modified or affected thereby.

Further answering said second count of said petition, defendant states that said policy was issued and executed by this defendant as aforesaid upon and in pursuance of an application in
34 writing therefor to this defendant, dated December 15th, 1880, signed by said Samuel E. Wall as the person whose life was to be assured therein, and by the plaintiff, Alice L. Wall, as the person for whose benefit said assurance was to be made; that in and by said application it was declared and agreed by said plaintiff and said Samuel E. Wall that all the statements and answers written therein were warranted to be true and were offered to this defendant as a consideration of the contract, to wit, of the policy of insurance thereby applied for and which was executed by defendant, as aforesaid, upon the faith and in consideration of said application, and that in and by said policy of insurance it was expressly declared and agreed that the contract between the parties thereto—that is to say, between the defendant, on the one hand, and said Samuel E. Wall and this plaintiff, on the other hand—was completely set forth in said policy and the said application therefor taken together, and that none of its terms could be modified nor any forfeiture under it waived except by an agreement in writing signed by the president, vice-president, actuary, secretary, or assistant secretary of the society, to wit, this defendant.

Defendant further states that among other statements and answers written on said application was one by which said Samuel E. Wall did, in consideration of the agreements contained in the policy thereby applied for, to wit, in the said policy of insurance executed by this defendant, as aforesaid, under date of December 23d, 1880, (being the agreement in said policy hereinafter fully set forth providing for paid-up insurance in the event of the surrender of the policy at certain periods and under certain conditions specified) waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not.

35 Defendant further states that said agreement last above-mentioned and contained in said policy, and in consideration of which agreement said Samuel E. Wall so waived and relinquished as aforesaid all right or claim to any other surrender value than that so provided, was in the words following, to wit:

"And, further, that if premiums upon this policy for not less than three complete years of assurance shall have been duly received by said society and this policy should thereafter become void in consequence of default in payment of a subsequent premium, said society will issue in lieu of such policy a new paid-up policy, without participation in profits, in favor of said Alice L. Wall, if living, and if not living, to the children of said Samuel E. Wall, or their guard-

ian for their use, or if there be no children surviving, then to the executors, administrators, or assigns of said Samuel E. Wall, for the entire amount which the full reserve on this policy, according to the present legal standard of the State of New York, will then purchase as a single premium, calculated by the regular table for single-premium polices now published and in use by the society: Provided, however, that this policy shall be surrendered duly receipted within six months of the date of default in payment of premium as mentioned above."

And defendant avers that even if said policy of insurance and this defendant's contract therein or obligation thereunder had otherwise been within the purview of or subject to be modified or affected by any provision of any law of the State of Missouri touching policies of insurance on life (which defendant denies), yet by reason of the premises the plaintiff is estopped from claiming the bene-
36 fit of any provision of any law of the State of Missouri, if any such law there be, for any other or different surrender value or upon any other or different conditions from those in said policy stipulated for as above set forth, and further avers that said policy of insurance has never been surrendered or offered to be surrendered to this defendant.

Further answering said second count of said petition, defendant admits that the annual premiums due on said policy on December 15th, 1881, and December 15th, 1882, were paid, as also the cash premium due when said policy was issued.

But denies that on December 15th, 1883, said policy had acquired a net value of or was worth the sum of one hundred and sixty-one dollars and five cents ($161.05), as alleged, or that the age of said Samuel E. Wall at that time was thirty-nine years; denies that three-fourths of such alleged net value of said policy, applied and taken as a net single premium for temporary insurance for the amount written therein, would have purchased or that said Samuel E. Wall was on account thereof, as alleged, entitled to a temporary insurance for said amount for a term expiring August 30th, 1886, and denies that said policy was kept or continued in force or effect under or by reason of any statute of the State of Missouri or in any other manner after said 15th day of December, 1883.

Defendant further denies that notice of the death of said Samuel E. Wall was duly received by defendant, or that any proofs of the death of said Wall have ever been furnished to defendant, or that it has in any manner waived the proofs, formal or other, required by said policy, or has waived any requirement of said policy whatever, and denies that either plaintiff or said Samuel E. Wall have fully complied with all the conditions of said policy and contract
37 on their respective parts, and on the contrary thereof avers that by reason of the non-payment of the annual premium due and payable under said policy on or before December 15th, 1883, and under the provisions of said policy the same was forfeited and defendant was after said date relieved from all obligations thereunder.

Defendant further denies knowledge or information sufficient to

form a belief whether the plaintiff in this action was the wife or is the widow of said Samuel E. Wall, and denies that said defendant is indebted to plaintiff in any sum or on any account whatever.

Further answering said amended petition, to wit, the allegation contained in the third count thereof, this defendant admits—

That it is a corporation as alleged.

That defendant, on the 23rd day of December, 1880, to wit, at the city of New York, State of New York, executed a certain contract in writing, being a policy of insurance upon the life of Samuel E. Wall, whereby, for the consideration and upon the conditions therein stated and not otherwise, this defendant promised to pay to Alice L. Wall, wife of said Samuel E. Wall, for her sole use, if living, in conformity with the statutes of the State of New York, the sum of five thousand dollars (any indebtedness to the society, to wit, this defendant, on account of said contract to be first deducted therefrom), at the office of the said society, this defendant, in the city of New York, to wit, in the State of New York, within sixty days after satisfactory proofs of the death of said Samuel E. Wall shall have been furnished to said society, to wit, this defendant, at its said office in said city and State of New York.

Whether the contract and policy of insurance filed with plaintiff's petition, as alleged, is the original policy of insurance exe-
38 cuted by defendant, as above admitted, defendant has no knowledge or information sufficient to form a belief, and prays the inspection thereof when produced at the trial of this cause, and prays leave to refer to said original instrument by it executed for all and singular the terms and conditions of said contract.

But defendant avers that the contract or policy of insurance, the execution whereof by defendant is alleged in the first count of plaintiff's said amended petition and which is above admitted, and the contract or policy of insurance, the execution whereof by defendant is also averred in the second count of plaintiff's amended petition herein and is also above admitted, and the said contract or policy of insurance, the execution whereof by defendant is also averred in the third count of plaintiff's amended petition herein and is also above admitted, are one and the same instrument and policy of insurance, and that this defendant never executed or delivered to any person any contract or instrument purporting to insure the life of said Samuel E. Wall except the one instrument or policy of insurance which is mentioned and referred to as well in the first count as in the second count and also in the third count of plaintiff's said amended petition herein.

Further answering said third count or alleged cause of action, defendant admits that said Samuel E. Wall paid the annual premiums which became due thereunder on the 15th day of December, 1881, and the 15th day of December, 1882, respectively.

Defendant says that it is true that no formal proofs of the death of said Samuel E. Wall have been made or tendered to defendant by the plaintiff or any other person, and also that defendant denied and still denies all liability under said policy.

But defendant denies each and every other allegation in said third

count of said amended petition contained, and avers that
39 among other conditions of said policy and contract which said Samuel E. Wall and the said plaintiff failed and neglected to fulfill was the payment of the annual premium which became due and payable thereunder on December 15th, 1883; by reason whereof defendant says that said policy became and was wholly forfeited and defendant was released from all further liability thereunder or by reason thereof.

And, having fully answered said amended petition of plaintiff, defendant prays to be hence discharged with its costs.

By HITCHCOCK, MADILL & FINKELNBURG,
Attorneys for said Defendant.

Said stipulation for removal of said cause is in words and figures as follows:

In the Circuit Court of the United States for the Western District of Missouri, Central Division, at Jefferson City.

ALICE L. WALL, Plaintiff,
vs.
EQUITABLE LIFE INSURANCE SOCIETY, Defendant.

This cause having been removed to this court from the circuit court of Henry county, Missouri, which is situated in the division for which courts are held at Kansas City, it is hereby stipulated and agreed between the parties hereto, in pursuance of the act of Congress approved February 28, 1887, that the said cause be removed to the circuit court of the United States for the western division thereof, at Kansas City.

M. A. FYKE & L. C. KRAUTHOFF,
Attorneys for Plaintiff.
HITCHCOCK, MADILL & FINKELNBURG,
Attorneys for Defendant.

40 Afterwards, to wit, at the regular May term, 1887, of said court and on the 27th day of May, A. D. 1887, the following entry appears of record in the above-entitled cause:

ALICE L. WALL
against
EQUITABLE LIFE ASSURANCE ASSOCIATION. } 1296.

This day come the parties, by their attorneys, and by consent this cause is submitted on the motion to strike out parts of the answer on briefs, to be filed in twenty days.

And afterwards, to wit, at the regular October term, 1887, of said court and on the 17th day of October, 1887, the following entry appears of record:

ALICE L. WALL
against
EQUITABLE LIFE ASSURANCE ASS'N. } 1296.

The motion to strike out parts of answer having been heretofore submitted and taken under advisement, now, the court being fully advised concerning the premises, it is ordered that said motion be sustained. Thereupon comes defendant and files motion to require plaintiff to elect upon which count of her petition she will proceed.

The opinion of the court sustaining said motion is in the words and figures following:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

ALICE L. WALL
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Opinion.

BREWER, *C. J.:*

This case is submitted on a motion to strike out parts of
41 the answer. Involved in this motion are two questions: First. Is the contract sued on governed and to be construed by the laws of the State of New York or by the laws of the State of Missouri? Second. If subject to the laws of Missouri, is the stipulation in respect to forfeiture legal and binding as a waiver of the provisions of the Missouri statutes? In respect to the first question these, I think, must be taken as the accepted facts: The defendant is a New York corporation, doing business in the State of Missouri. The insured was a citizen and resident of Missouri, and made his application here, which was forwarded to New York. The application was accepted, the policy fully prepared and signed in that State, and sent to Missouri and delivered to the applicant here. By the terms of the policy all premiums are payable at the defendant's office in New York. If the sum insured should become payable the payment is to be made at its office in New York. None of the terms of the policy can be modified except by one of the four general officers of the society, and no modification is claimed. Under these facts I have little doubt as to the true answer to be made to this first question. In White *vs.* Insurance Company, 4 Dillon, 177, it was held that the act of the Legislature of the State of Missouri of March 23, 1874, in respect to policies of life insurance extends to all policies delivered in this State after the act went into effect. That was a suit against a foreign insurance company doing business in this State. In Fletcher *vs.* New York Insurance Company, 13 Fed. Rep., 526, it was held that a foreign insurance company cannot withdraw itself from the operation of the statutes of a State in which it does business by the insertion of clauses in its policies. That was a case in which the defendant company in-

sisted that by virtue of certain clauses in the application the
42 contract was to be finally and fully executed in New York.

In his opinion, an opinion concurred in by Circuit Judge McCrary, Judge Treat uses this language: "The defendant corporation, having been permitted to do business in Missouri under the statutes of the latter, was bound by all the provisions of those statutes, and could not by the insertion of any of the many clauses of its forms of application, etc., withdraw itself from the obligatory force of the statute. The contract of insurance, therefore, is a Missouri contract, and subject to the local law." This case was taken to the Supreme Court of the United States, and is reported — 117 U. S., 519. The case was there decided upon a different question, but in the statement of facts, which, as it appears, was prepared by the justice writing the opinion, appears this language: "The company is a corporation under the laws of New York, but it also transacts business in Missouri through agents residing there, and of course, with reference to the business done in that State, is subject to its laws." In view of these authorities and considering the reasoning of Judge Treat in the opinion above referred to, I deem it unnecessary to discuss this question further, and simply hold that the Missouri statute controls. See also Ehrman *vs.* Insurance Company, 1 McCrary, 123; *In re* Insurance Company, 22 Fed. Rep., 109; Paul *vs.* Virginia, 8 Wallace, 168.

In respect to the second question the following are the two sections of the statutes which are applicable:

SECTION 5983, 2. R. Stat. "No policy of insurance on life hereafter issued by any life insurance company authorized to do business in this State on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void by reason of the non-payment of premium thereon, but it shall be subject to the following rules
43 of commutation, to wit." Then follows a statement of the mode of computing the amount payable in such case.

SECTION 5985. "If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section five thousand nine hundred and eighty-three, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding." Now, in the policy sued on there is a non-forfeiture clause, but containing a different provision, and it is alleged that in the application the insured waived and relinquished all right or claim to any other surrender value than that provided in the policy, whether required by the statute of the State or not. This is the doubtful question. It is strenuously insisted by the defendant that the statute of Missouri neither forbids nor declares null nor makes anywise illegal such a waiver as the one in question; that it merely gives a right of privilege to the insured, which, like any other personal right or privilege, he may, for sufficient consideration, waive, and that such a waiver, not being for-

bidden by the statute, is not contrary to public policy in any such sense as that the court should refuse to enforce it. Back of this argument and strongly supporting it is that liberty of contract which courts are so strenuous to uphold. While I am constrained to hold adversely to the defendant, it is with grave doubts as to the correctness of my conclusion. In the first place, a technical argument can be made on the language of the statute. It says that the value of the policy shall be determined in a certain way, and then that if the death of the insured occur during the term of temporary
44 insurance covered by the value of the policy thus determined the company shall be bound to pay the amount of the policy, "anything in the policy to the contrary notwithstanding." This language is broad enough to include a waiver, and may be construed as meaning that no stipulation, no waiver, no agreement for a different forfeiture—in fact, nothing that a party can put into a policy—shall defeat the right to recover the full amount if death occurs during this time of temporary insurance. Of course, this is a purely technical construction of the statute, and I am disposed to rest my conclusion more upon the matter of public policy; and here the history of insurance must be taken into consideration. It is notorious that many insurance companies were rigorous in insisting upon forfeiture, sometimes under very inequitable circumstances, and there was no little public clamor by reason thereof. Such clamor prompted many Legislatures to interfere and seek by legislation to protect what they supposed the rights of the insured. Such seems to have been the thought of the Missouri Legislature, and it evidently intended by its legislation to provide a fixed and absolute rule, applicable to all cases—absolute and universal—because if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive—in fact, no words of negation in any direction—yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce. R. R. Co. *vs.* Peavy, 29 Kan., 169. The Legislature has, by this language, declared a rule in respect to forfeitures in
45 life insurance policies. It has thus established the policy which it believes should obtain in this State, and though sitting on the Federal bench, it is my duty to administer the laws of this State in the spirit in which they were enacted, and to uphold both their letter and their spirit. It is voluntary with any foreign insurance company whether it shall come into this State to transact business. Coming in, it should be willing to comply with all the statutes as to all business arising within this State, and no court, least of all a Federal court, should hasten to release it from this obligation. From these views and with this feeling I am constrained, though with grave doubts, to sustain the motion to strike out.

Afterwards, on Wednesday, January 11th, 1888, it being an ad-

journed day of said Oct. term, 1887, the following entry appears of record:

ALICE LENORA WALL
against
EQUITABLE LIFE ASSURANCE ASSOCIATION. } 1296.

This day come the parties, by their attorneys—the plaintiffs by Mr. L. C. Krauthoff, and the defendant by Mr. Henry Hitchcock; thereupon, by consent, the defendant presents a bill of exceptions as to the ruling of the court upon the motion of plaintiff to strike out parts of the answer herein, and the same is, by consent, signed and sealed by the court and ordered to be made a part of the record herein, which is accordingly done. Comes also the said plaintiff, by her said attorney, and suggests to the court that since the bringing of this action she has intermarried with one Henry Q. Clements, and prays that the said Clements be made party plaintiff herein, and that this suit be revived in the names of Alice Lenora Clements and Henry Q. Clements, her husband, against the said defendant; whereupon, by consent of defendant, by its
46 said attorney, entered in open court, it is ordered that the action be revived as prayed, and the said plaintiff, Henry Q. Clements, enters his appearance.

And the said plaintiffs, by leave of the court, dismiss the first and third causes of action alleged in their petition; and this cause being regularly called for trial and a stipulation of counsel waiving a jury having been heretofore filed, the cause is heard by the court and the issues submitted upon the pleadings and the proofs.

Said bill of exceptions, filed on the 11th day of January, 1888, is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *Western District of Missouri:*

In the Circuit Court of the United States for the Said Western District of Missouri, Western Division.

ALICE L. WALL, Plaintiff,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant. } Law Case, Number 1296.

Be it remembered that in the above-entitled cause, on the 2nd day of March, A. D. 1886, to wit, at the November term of said circuit court, there was filed by said plaintiff a motion to strike out parts of the answer filed by said defendant to the amended petition of plaintiff in said case; which motion was in words and figures following:

47 In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri.

ALICE L. WALL, Plaintiff,
vs.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant. } No. 1875.

The said plaintiff comes now and moves the court to strike out all those portions of the defendant's answer embraced in bracket No. 1, being all the matter on lines 15 to 22, both inclusive, on page 6 of said answer, which is in words and figures as follows:

"And defendant avers that the said contract of defendant being so by it executed and so by it to be performed in the State of New York was a contract under and to be construed and governed by the laws of the said State of New York and not by the laws of any other State, nor was nor is said contract or defendant's obligation thereunder within the purview of any law of the State of Missouri touching policies of insurance on life nor subject to be modified or affected thereby." And in bracket No. 2, being all the matter on page 7, from line 17 to the end; all of page 8, and on page 9 from line one to line 5, both inclusive, which is in words and figures as follows:

Defendant further states that among other statements and answers written on said application was one by which said Samuel E. Wall did, in consideration of the agreements contained in the policy thereby applied for, to wit, in the said policy of insurance executed by this defendant as aforesaid, under date of December 23d, 1880

48 (being the agreement in said policy, hereinafter fully set forth, providing for paid-up insurance in the event of the surrender of the policy at certain periods and under certain conditions specified), waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not.

Defendant further states that the said agreement last above mentioned and contained in said policy and in consideration of which agreement said Samuel E. Wall so waived and relinquished as aforesaid all right or claim to any other surrender value than that so provided, was in the words following to wit:

"And, further, that if premiums upon this policy for not less than three complete years of assurance shall have been duly received by said society, and this policy should thereafter become void in consequence of default in payment of a subsequent premium, said society will issue in lieu of such policy a new paid-up policy, without participation in profits, in favor of said Alice L. Wall, if living, and, if not living, to the children of said Samuel E. Wall or their guardian for their use; or, if there be no children surviving, then to the executors, administrators, or assigns of said Samuel E. Wall for the entire amount which the full reserve on this policy according to the present legal standard of the State of New York will then purchase as a single premium calculated by the regular table for single-pre-

mium policies now published and in use by the society: Provided, however, that this policy shall be surrendered duly receipted within six months of the date of default in payment of premium as mentioned above."

And defendant avers that even if said policy of insurance and this defendant's contract therein or obligation thereunder had otherwise been within the purview of or subject to be modified or affected by any provision of any law of the State of Missouri touching
49 policies of insurance on life (which defendant denies), yet, by reason of the premises, the plaintiff is estopped from claiming the benefit of any provision of any law of the State of Missouri, if any such there be, for any other or different surrender value or upon any other or different conditions from those in said policy stipulated for as above set forth, and further avers that said policy of insurance has never been surrendered or offered to be surrendered to this defendant; and for grounds assign:

1. That the matter No. 1 is a mere conclusion of law, and as such is incorrect, as upon the allegation of the petition and the admissions contained in said answer the policy sued on was subject to the provisions of the Missouri statute referred to.

2. That the matters embraced in said bracket No. 2 constitute no defense herein.

3. That said alleged waiver is void because contrary to public policy and to the policy and laws of this State, and is forbidden and declared null by the statutes of this State, to all of which the said policy was subject.

SMITH & KRAUTHOFF, WITH
M. A. FYKE, *For Plaintiff.*

And thereafter, to wit, on the 1st day of July, 1887, said motion, being argued by counsel for said parties respectively, was submitted to the court and was taken under advisement, and thereafter, on the 17th day of October, 1887, to wit, at the October term, A. D. 1887, thereafter, the said court sustained said motion and ordered that said portions of said answer of defendant in said motion mentioned should be stricken out; to which action of the court in that behalf said defendant, by its counsel, then and there excepted.

50 And forasmuch as the said motion and ruling thereon and the said exceptions of defendant to such ruling do not appear of record in this cause, and it having been agreed by and between said parties, plaintiff and defendant, by their respective counsel, at the time when said motion was argued and submitted as aforesaid, that either party should, at the next succeeding term of court, have the right to tender a bill of exceptions to the ruling of the court on such motion, and that such bill of exceptions should at such succeeding term be allowed, signed, sealed, and made part of the record with the like effect as if the same had been done at the time when said motion was decided by the court, now, therefore, this bill of exceptions is allowed, signed, and sealed, and, by the consent of the plaintiff, it is ordered that the same be filed at the present term of said court as part of the record in said cause *nunc pro tunc* and with

like effect as if so allowed and filed on the day when said motion was sustained as aforesaid.

AMOS M. THAYER, *Judge.* [SEAL.]

Afterwards, to wit, on the 12th day of January, A. D. 1888, it being an adjourned day of said October term, 1887, of said court, the following entry appears of record:

ALICE LENORA CLEMENTS & HUSBAND
against
THE EQUITABLE LIFE ASSURANCE SOCIETY. } 1296.

This day again come the parties, by their attorneys, and this cause having been submitted to the court without the intervention of a jury and taken under advisement, now, the premises having been considered, the court doth find that the defendant is indebted to the plaintiff, by reason of the matters alleged in the petition, in the sum of six thousand one hundred and twenty-five dollars.

Thereupon comes defendant, by its attorney, and files
51 herein a motion for new trial, and the same, being submitted, is by the court denied.

It is therefore considered by the court that the plaintiffs, Alice Lenora Clements and Henry Q. Clements, her husband, recover against the defendant, The Equitable Life Assurance Society of the United States, the said sum of six thousand one hundred and twenty-five dollars, so found to be due, with their costs, to be taxed by the clerk, and have thereof execution.

Comes again, thereupon, the said defendant, by its attorney, and presents to the court a bill of exceptions herein and prays that the same be signed and sealed by the court and made a part of the record herein, which is accordingly done. Defendant also presents to the court a writ of error to reverse the above judgment and a bond, as required by law, to act as a supersedeas of said judgment, and prays the court to allow said writ and approve said bond, which is accordingly done, and the court doth sign and issue a citation to the said plaintiff to appear at a supreme court therein named and answer said writ.

Said bill of exceptions is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western District of Missouri (Western Division).

HENRY Q. CLEMENTS and ALICE L. CLEMENTS (Formerly Wall), His Wife, Plaintiffs,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant. } 1296. Law Case.

Be it remembered that the above-entitled cause came on
52 for trial at the October term, 1887, of said circuit court, to wit, on the eleventh day of January, A. D. 1888, and was tried be-

fore the Honorable Amos M. Thayer, district judge, holding said circuit court, at which trial the following proceedings were had:

Alice L. Wall, formerly sole plaintiff in said cause, by her attorneys of record, suggested to the court that on the 24th day of July, 1887, she, the plaintiff, had intermarried with Henry Q. Clements; whereupon, on motion of said plaintiff, Alice L. Clements (formerly Wall), by her said attorneys, and the said defendant, by its attorneys of record appearing and consenting thereto, it was ordered that the said cause be revived in the names of Henry Q. Clements and the said Alice L. Clements (formerly Wall), his wife; and the defendant appearing to said cause as so revived in the name of the joint plaintiffs and consenting thereto, the trial of said cause was proceeded with as follows, with leave to said parties, respectively, to make by interlineation such amendments to the pleadings in said cause, respectively, as might be necessary to make said Henry Q. Clements a party thereto.

By consent of said parties, plaintiff and defendant, a jury was waived, and said cause was submitted for trial to the court, sitting as a jury.

Thereupon the amended petition heretofore filed in said cause by said Alice L. Wall as sole plaintiff, and as amended as aforesaid, was read as and for the joint petition of said Henry Q. Clements and Alice L. Clements (formerly Wall), his wife, and by consent and leave of court the answer of defendants to said amended petition heretofore filed was read as and for its answer to said amended petition of said joint plaintiffs, plaintiff having first by leave of court dismissed said cause as to the first count and the third count of said petition.

53 Thereupon said plaintiffs, to sustain the issues on their part, to wit, the issues presented by the second count of said petition and defendant's answer thereto, offered the following testimony:

(1.) An application in writing and print addressed to the Equitable Life Assurance Society of the United States, to wit, this defendant, and dated at Windsor, Missouri, December 15th, 1880, signed by Alice Lenora Wall as the person for whose benefit such assurance was applied, and by Samuel Everett Wall as the person whose life was to be assured, being an application for a policy of assurance on the life of said Samuel E. Wall for $5,000, premium payable annually.

It was admitted and agreed by both parties that said paper was the original application made to this defendant by Samuel E. Wall, named as the assured in the policy herein sued on, and by Alice L. Wall, his wife, one the plaintiffs herein, and by them signed, and that said paper is the application referred to in the policy sued on and in the pleadings in this cause as being a part thereof.

It is agreed by the parties to this cause that said application contained, among other printed questions to be answered by the person making said application and for whose benefit the assurance was to be effected by the policy applied for, the following question, to wit:

"27. Does the person for whose benefit the assurance is effected, in consideration of the agreements contained in the policy hereby applied for (providing for paid-up insurance in the event of surrender of the policy at certain periods and under certain conditions specified), waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not?"

54 It is further agreed that in said application the said question above set forth was answered by the word "Yes" written against the same.

Also that the said application contained the following further statements, over the said signatures of the said Alice Lenora Wall, plaintiff herein, and said Samuel Everett Wall—that is to say: "It is hereby declared and agreed that all the statements and answers written on this application are warranted to be true and are offered to the society as a consideration of the contract, which shall not take effect until the first premium shall have been actually paid during the life of the person herein proposed for assurance."

(2.) The policy sued on in this case and filed with the petition therein, a copy of which policy is as follows, including the provisions and requirements referred to in and printed on the back of said policy as part thereof:

The Equitable Life Assurance Society of the United States,

Premium, $136.25. Amount, $5,000.
Age, 36. No. 227,711.

120 Broadway, New York,

In consideration of the application of this policy of insurance and of each of the statements made therein;

And in further consideration of the payment of the sum of one hundred and thirty-six dollars and twenty-five cents at the office of the society in the city of New York, at the date hereof, the receipt whereof is hereby acknowledged, and of the annual payment of one hundred and thirty-six dollars and twenty-five cents, to be made at the said office on or before the fifteenth day of December in every year during the continuance of this contract—

Does promise to pay to Alice L. Wall, wife of Samuel E.
55 Wall, for her sole use, if living, in conformity with the statutes, and if not living, to the surviving children of said Samuel E. Wall or their guardian for their use; or if there be no such children surviving, then to the executors, administrators, or assigns of said Samuel E. Wall, the sum of five thousand dollars (any indebtedness to the society on account of this contract to be first deducted therefrom) at the office of the society in the city of New York, within sixty days after satisfactory proofs of the death of said Samuel E. Wall, of Windsor, in the county of Henry, State of Missouri, shall have been furnished to the society at its said office.

And the said society does hereby further promise and agree that after three years from the date hereof the only conditions which shall be binding upon the holder of this policy are that he shall pay

the premiums at the times and place and in the manner herein stipulated, and that the regulations of the society as to age, residence, travel, occupation, and employments shall be observed, and that in all other respects, after the expiration of said three years, the liability of the said society under this policy shall not be disputed.

And, further, that if the premiums upon this policy for not less than three complete years of assurance shall have been duly received by said society and this policy should thereafter become void in consequence of default of payment of a subsequent premium, said society will issue, in lieu of such policy, a new paid-up policy, without participation in profits, in favor of said Alice L. Wall, if living, and if not living, to the children of said Samuel E. Wall, or their guardian for their use; or if there be no children surviving, then to the executors, administrators, or assigns of said Samuel E.
56 Wall for the entire amount which the full reserve on this policy, according to the present legal standard of the State of New York, will then purchase as a single premium, calculated by the regular table for single-premium policies now published and in use by the society: Provided, however, that this policy shall be surrendered, duly receipted, within six months of the date of default in payment of premium, as mentioned above.

This policy is issued and accepted upon the condition that the provisions and requirements printed or written by the society upon the back of this policy are accepted by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In witness whereof the Equitable Life Assurance Society of the United States has caused this policy to be signed by its president and secretary, at the office in the city of New York, the twenty-third day of December, A. D. one thousand eight hundred and eighty.

(Signed) G. W. PHILLIPS,
Acting President.

(Signed) W. ALEXANDER, *Secretary.*

For a wife.
G. 80.

No person except the president, vice-president, actuary, secretary, or assistant secretary is authorized to make, alter, or discharge contracts or waive forfeitures.

The provisions and requirements in said policy referred to as printed upon the back thereof, so far as material or read in evidence in this cause, were the following:

"4. All premiums are due in the city of New York at the date named in the policy; but at the pleasure of the society suitable persons may be authorized to receive such payments at other places, but only on the production of the society's receipt therefor, signed by the president, vice-president, actuary, secretary, or assistant
57 secretary and countersigned by the person to whom the payment is made. No payment made to any person, except in exchange for such receipt, will be recognized by the society. All

premiums are considered payable annually in advance. When the premium is made payable in semi-annual or quarterly instalments that part of the year's premium, if any, which remains unpaid at the maturity of this contract shall be regarded as an indebtedness to the society on account of this contract, and shall be deducted from the amount of the claim; and if any premium or installment of a premium on this policy shall not be paid when due this policy shall be void; nevertheless, nothing herein shall be construed to deprive the holder of this policy of the privilege to demand and receive paid-up insurance in accordance with the agreement contained in this policy.

5. The contract between the parties hereto is completely set forth in this policy and the application therefore, taken together, and none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing, signed by the president, vice-president, actuary, secretary, or assistant secretary of the society, whose authority for this purpose will not be delegated."

(3.) Receipts from the Equitable Life Assurance Society, defendant herein, for the annual premium due and payable on said policy in December, 1881, and December, 1882, the payment of which premiums respectively at said dates was admitted by the defendant.

(4.) A notice from the defendant company to Samuel E. Wall, dated November —, 1883, that the annual premium on said policy for the year 1883 would be due and payable on December 15th, 1883, as provided for in said policy, the gross amount of said premium being one hundred and thirty-six dollars and twenty-five cents, less dividend of twenty dollars and seventy-four cents,
58 the net amount of said premiums payable December 15th, 1883, leaving one hundred and fifteen dollars and fifty-one cents, which notice it was admitted by defendant was sent by it to said Samuel E. Wall at the date thereof.

5. A letter, dated St. Louis, January 30th, 1884, to the plaintiff from J. S. Kendrick, who is admitted by the defendant to have been its agent at St. Louis at said date, which letter is as follows:

"ST. LOUIS, *Jan'y 30th*, 1884.

Mrs. S. E. Wall, Henrietta, Mo.

DEAR MADAM: Your letter of the 28th inst. received. Mr. J. M. Wall has advised me of the death of your husband, and I have written the society submitting the facts. What action they will take I do not know, but I am sure they will do what they believe to be best. I will advise you when I hear from the society.

Y'rs resp'y,
(Signed) J. S. KENDRICK."

6. A letter to plaintiff, dated St. Louis, February 12th, 1884, also from J. S. Kendrick, admitted by the defendant to have been its agent at said date, which is as follows:

"ST. LOUIS, *Feb'y 12th*, 1884.

Mrs. S. E. Wall, Henrietta, Mo.

DEAR MADAM: The society informs me that the committee on claims have duly considered the correspondence relating to policy No. 277,711, and say: "While not recognizing any claim whatever under the policy, we are disposed to act with liberality and treat it in a moral light, and in keeping therewith we are ready to allow the value of the paid-up policy applied for by Mr. Wall
59 during his lifetime, the details of which, we presume, were not consummated by him on account of his illness. The value of the paid-up policy was $366, and if the beneficiary is ready to accept the offer you may furnish blank proofs, and upon their receipt, if satisfactory, we will pay the amount immediately.

Please let me know your decision.

Y'rs resp'y,

(Signed) J. S. KENDRICK, *Cashier*."

7. Deposition of plaintiff, Alice L. Clements, as follows:

"My name is Alice L. Clements. I was married to Henry Q. Clements on the 24th day of July, 1887, at Johnson county, Missouri. Previous to my marriage to said Clements I was the widow of Samuel E. Wall. I was married to Samuel E. Wall on the 1st day of October, 1868, at the county of Pettis, in the State of Missouri. Said Samuel E. Wall was the identical person whose life was insured by the Equitable Life Assurance Society of the United States, by its policy dated December 23d, 1880, for the sum of five thousand dollars. Said Samuel E. Wall died on the 21st day of January, 1884. He was taken sick on the 6th day of Dec., 1883. Said Samuel E. Wall at the time of his death was 39 years of age. The cause of his death, as affiant believes, was catarrhal bronchitis, resulting in pyæmia, and this affiant is the identical person named in said policy as beneficiary.

(Signed) ALICE L. CLEMENTS."

Defendant objected to so much of said deposition as tended to show the age of Samuel E. Wall at the time of his death as immaterial and incompetent; which objection was overruled by the court, and the court admitted all of said deposition. The defendant then and there excepted.

60 Also the deposition of J. F. Robinson, as follows:

"My name is J. F. Robinson. I am a practicing physician, and was engaged in that business in January, 1884. I was well acquainted with Samuel E. Wall and with Alice L. Wall, his wife. I attended said Samuel E. Wall as his physician in his last illness.

Said Samuel E. Wall died on the 21st day of January, 1884. The cause of his death was catarrhal bronchitis, resulting in pyæmia.

(Signed) J. F. ROBINSON, *M. D.*"

(8.) Plaintiff then and there offered testimony tending to show the truth of the following allegations contained in the petition and each of them—that is to say:

That said Samuel E. Wall paid the annual premiums on the said policy for the years 1881 and 1882 when due, in addition to the premium paid at the time said policy was issued, making three full annual payments of premiums; that by virtue of said three payments the said policy on said 15th day of December, 1883, had acquired a net value and was to said defendant worth the sum of $161.05, as computed by the American experience table of mortality, with four and one-half per cent. per annum interest; that neither the said Samuel E. Wall nor the plaintiff *were* at that time indebted to the defendant on account of any past premiums on said policy nor on any other account; that the age of said Samuel E. Wall at that time was thirty-nine years; that three-fourths of such net value of said policy, applied and taken as net single premium for temporary insurance for the amount written in said policy, entitled said Samuel E. Wall to a temporary insurance for said amount for the term expiring on the 30th day of August, 1886, under the rule set forth in section 5983 of the Revised Statutes of Missouri of 1879.

Defendant's counsel admitted that the testimony offered by plaintiffs in support of said several allegations did tend to show
61 and establish the same, and if received would sufficiently prove said allegations to be true, but defendant objected to the admission of any testimony tending to show the net value of said policy on December 15th, 1883, as computed by the American experience table of mortality, with four and one-half per cent. per annum interest, or as computed in accordance with the said statute of Missouri; also to any evidence as to the age of said Samuel E. Wall at the time of his death; also to any evidence tending to show that three-fourths of the net value of said policy, computed as above stated and taken as a net single premium, would purchase or pay for a temporary insurance for said amount for any or what period. All said objections are on the ground that the said testimony offered by plaintiff was immaterial, irrelevant, and incompetent under the terms and conditions of the policy sued on in this case, because said policy is to be construed by the law of the State of New York, and also because in and by the application for said policy said plaintiff waived the benefit of any provisions of any statute of Missouri.

All of said objections were then and there overruled by the court and all of the said testimony so offered by the plaintiff was then and there admitted against defendant's objections; to which ruling and action of the court said defendant then and there excepted.

This was all the testimony offered by said plaintiffs to support the issues on their part.

No testimony was offered by the defendant in said cause.

Thereupon the defendant prayed the court to grant the following instructions or declarations of law in said case—that is to say:

62 In the Circuit Court of the United States for the Western District of Missouri (Western Division).

HENRY Q. CLEMENTS and ALICE L. CLEMENTS, Pl'ffs,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Def't.
No. 1296. Law Cases.

1. Defendant prays the court, in the above-entitled cause, to declare the law as follows:

That under the terms and conditions of the policy sued on in this case the contract of assurance in and by said policy made by the defendant is a contract governed and to be construed by the laws of the State of New York and is not to be governed or to be construed by the laws of the State of Missouri.

In the Circuit Court of the United States for the Western District of Missouri (Western Division).

HENRY Q. CLEMENTS and ALICE L. CLEMENTS, Pl'ffs,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Def't.
No. 1296. Law Cases.

2. Defendant prays the court in the above-entitled cause to declare the law to be that on the pleadings and evidence the plaintiff is not entitled to recover anything upon the second count in the petition herein.

63 In the Circuit Court of the United States for the Western District of Missouri (Western Division).

HENRY Q. CLEMENTS and ALICE L. CLEMENTS, Pl'ffs,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Def't.
No. 1296. Law Cases.

3. Defendant in the above-entitled cause prays the court to declare the law as follows:

That the following condition and provision contained in the policy herein sued on, namely:

"And, further, that if premiums upon this policy for not less than three complete years of assurance shall have been duly received by said society, and this policy should thereafter become void in consequence of the default in payment of any subsequent premium, said society will issue in lieu of said policy a single paid-up policy, without participation in profits, in favor of said Alice L. Wall, if living, and if not living, to the children of said Samuel E. Wall or their guardian for their use, or if there be no children surviving,

then to the executors, administrators, or assigns of said Samuel E. Wall for the entire amount which the full reserve on this policy, according to the present legal standard of the State of New York, will then purchase as a single premium, calculated by the regular table for single-premium policies now published and in use by the society: Provided, however, That this policy shall be surrendered, duly receipted, within six months of the date of default in payment of premium, as mentioned above," was and is a valid condition of said policy, binding upon the assured therein, and that said condition was not nor is modified or abrogated by any law of the State of Missouri in force at the date of said policy.

64 In the Circuit Court of the United States for the Western District of Missouri (Western Division).

HENRY Q. CLEMENTS and ALICE L. CLEMENTS, Pl'ffs,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Def't.
} No. 1296. Law Cases.

4. The defendant in the above-entitled cause asks the court to declare the law as follows:

If the court, sitting as a jury, shall find from the evidence that the policy herein sued on was issued by the defendant upon and in pursuance of an application in writing therefor, signed by Samuel E. Wall, the assured therein, and Alice Lenora Wall, plaintiff in this suit; and shall further find from the evidence that in said application, so signed by them, was contained, among other things, the following question:

"Does the person, in consideration of the agreements contained in the policy hereby applied for (providing for paid-up insurance in the event of surrender of the policy at certain periods and under certain conditions specified), waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not?"

And the court, sitting as a jury, shall further find that to said question so contained in said application the answer "Yes" was written therein over said signatures to said application;

And the court, sitting as a jury, shall further find that said application, so signed as aforesaid, further contained the following statements, to wit: "It is hereby declared and agreed that all the statements and answers written on this application are warranted to be true and are offered to the society as a consid-
65 eration of the contract, which shall not take effect until the first premium shall have been actually paid during the life of the person herein proposed for assurance;"

And if the court, sitting as a jury, shall further find that said application, so signed and containing the statements above-mentioned, was by said plaintiff or her consent delivered to the defendant as and for the application for said policy, and that said policy herein

sued on was issued by the defendant upon the faith and in pursuance of said application—

Then the court declares the law to be that said Alice L. Clements (formerly Wall) plaintiff herein, did thereby waive and relinquish any benefit of or claim against this defendant under said policy based or which might be based upon any provisions of any statute of the State of Missouri substantially differing from or inconsistent with the agreements contained in the policy herein sued on in respect of the terms upon which, in case of default in payment of premium, the said beneficiary would be entitled to a new paid-up policy; and in such case, if the court, sitting as a jury, shall further find that an annual premium on said policy became payable to defendant under the terms thereof on the 15th day of December, 1883, and that such premium was not paid as by said policy provided for; and shall further find that the policy herein sued on was not surrendered to the defendant, and that no offer was made by said plaintiff to surrender the same within six months from the date of said default in payment of said premium, then the plaintiff is not entitled to recover anything in this action.

Each and all of said instructions or declarations of law so asked for by defendent were by the court refused; to which action of the court in refusing said instructions and each of them said defendants then and there excepted.

66 Thereupon the issues of fact in said cause were submitted by said parties respectively for determination to the court, sitting as a jury, and the same were taken under advisement.

And thereafter, on the 12th day of January, A. D. 1888, to wit, at the said October term, 1887, of said court, the court, sitting as a jury, rendered its verdict in said cause in due form in favor of said plaintiffs and against said defendant, and assessed the damages in favor of plaintiffs at the sum of $6,125, being the amount insured in said policy, to wit, $5,000, together with interest thereon, at the rate of six per cent. per annum, from sixty days after February 12th, 1884, the date of its refusal to pay said loss.

Thereupon and on the same day said defendant filed in said cause its motion for a new trial therein; which motion was in the words and figures following:

"Now comes said defendant and moves the court to set aside the verdict rendered in favor of said plaintiffs by the court, sitting as a jury, in the above-entitled cause, and to grant defendant a new trial in said cause for the reasons following:

Because the court erred at the trial of said cause in admitting, against defendant's objection, immaterial, irrelevant, and incompetent testimony offered by the said plaintiffs.

Because the court erred at said trial in refusing proper instructions or declarations of law prayed for by defendant.

Because upon the pleadings and evidence in said cause the verdict should have been for the defendant.

Because there was no testimony offered by plaintiff tending to show that the annual premium due on December 15th, 1883, under

the terms of the policy sued on, was paid or tendered as provided for by said policy; nor was any testimony offered by plaintiffs
67 tending to show that the plaintiff, Alice L. Clements (formerly Wall), beneficiary therein, at any time complied with the conditions prescribed in said policy, in case of a default of payment of any annual premium, with respect to obtaining a paid-up policy.

Because it appeared from plaintiff's own testimony that under the terms of the policy sued on said plaintiff, Alice L. Clements, at and before the death of said Samuel E. Wall, had forfeited all right under said policy to recover the amount insured thereby or any part thereof, and that this defendant was not liable in this action for any sum under or by reason of its covenants in this policy.

(Signed) HITCHCOCK, MADILL & FINKELNBURG,
Attorneys for Defendant."

Which motion for a new trial was then and there, to wit, on said 12th day of January, 1888, submitted to the court, and was by the court overruled; to which action of the court in overruling said motion said defendant then and there excepted.

And forasmuch as the proceedings at said trial and the rulings and actions of the court therein, as above set forth, and the said exceptions of said defendant thereto do not appear of record in this cause the said defendant prays the court that this its bill of exceptions may be allowed and signed and sealed and made a part of the record in said cause, which is accordingly done.

AMOS M. THAYER, *Judge.*

Agreed to.
M. A. FYKE & L. C. KRAUTHOFF, *For Pl'ffs.*

68 Said bond for writ of error is in the words and figures following:

UNITED STATES OF AMERICA, *sct:*

Know all men by these presents, that we, The Equitable Life Assurance Society of the United States, A. W. Armour, and David R. Porter, are held and firmly bound unto Alice Lenora Clements and Henry Q. Clements, their executors and administrators, in the sum of thirteen thousand dollars; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of January, A. D. 1888.

Upon this express condition, to wit: Whereas the above-named The Equitable Life Assurance Society of the United States has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the cause above named by the circuit court of the United States for the western division of the western district of Missouri: Now, if the above named The Equitable Life Assurance Society of the United States shall prosecute its said writ of error to effect and answer all damages and costs if it

shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES, [SEAL.]
By HENRY HITCHCOCK, *Its Attorney.*
DAVID R. PORTER. [SEAL.]
A. W. ARMOUR. [SEAL.]

The above bond is hereby approved and ordered to be filed and made a part of the record.

AMOS M. THAYER, *Judge.*

69 UNITED STATES OF AMERICA, } *ss:*
Western District of Missouri, }

David R. Porter, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein, and is worth, over and above all his debts and liabilities, the sum of fifteen thousand dollars, and that he owns real and personal property to that amount subject to execution in the State of Missouri.

(Signed) DAVID R. PORTER.

Subscribed and sworn to before me this 12th day of January, A. D. 1888.

[SEAL.]

WARREN WATSON,
Comm'r U. S. Cir. Court,
Western Dist. of Mo.

The right of Henry Hitchcock to sign the name of the principal to the within bond is admitted, the qualification by A. W. Armour is waived, and the sufficiency of the bond is admitted.

L. C. KRAUTHOFF, *For Pl'ffs.*

Jan'y 12, 1888.

70 UNITED STATES OF AMERICA, *sct:*

I, Warren Watson, clerk of the circuit court of the United States for the western division of the western district of Missouri, do hereby certify that the foregoing is a true transcript of the record and proceedings and the original assignment of errors, writ of error, and citation in the cause therein named as fully as the same appears in my office.

Seal of the United States Circuit Court for the Western District of Missouri, Western Division.

Witness my hand as clerk and the seal of said court. Done at office, in the city of Kansas, Missouri, this 15th day of February, A. D. 1888.

WARREN WATSON, *Clerk,*
By —— ——, *D. C.*

[Endorsed:] No. —. United States circuit court, western division of the western district of Missouri. —— ——, plaintiff, against —— ——, defendant. Certified copy of the — in the above-entitled cause. Fee,——.

Endorsed on cover: W. Missouri C. C. U. S. No. 340. The Equitable Life Assurance Society of the United States, plaintiff in error, *vs.* Alice Leonora Clements and Henry Q. Clements, her husband. Filed March 7th, 1888.

FILED
APR 4 1891
JAMES H. McKENNEY
CLERK

BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 340.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ALICE LENORA CLEMENTS' ADMINISTRATOR ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

HENRY HITCHCOCK,
G. A. FINKELNBURG,
Of Counsel for Plaintiff in Error.

[Endorsed:] No. —. United States circuit court, western division of the western district of Missouri. —— ——, plaintiff, against —— ——, defendant. Certified copy of the — in the above-entitled cause. Fee, ——.

Endorsed on cover: W. Missouri C. C. U. S. No. 340. The Equitable Life Assurance Society of the United States, plaintiff in error, *vs.* Alice Leonora Clements and Henry Q. Clements, her husband. Filed March 7th, 1888.

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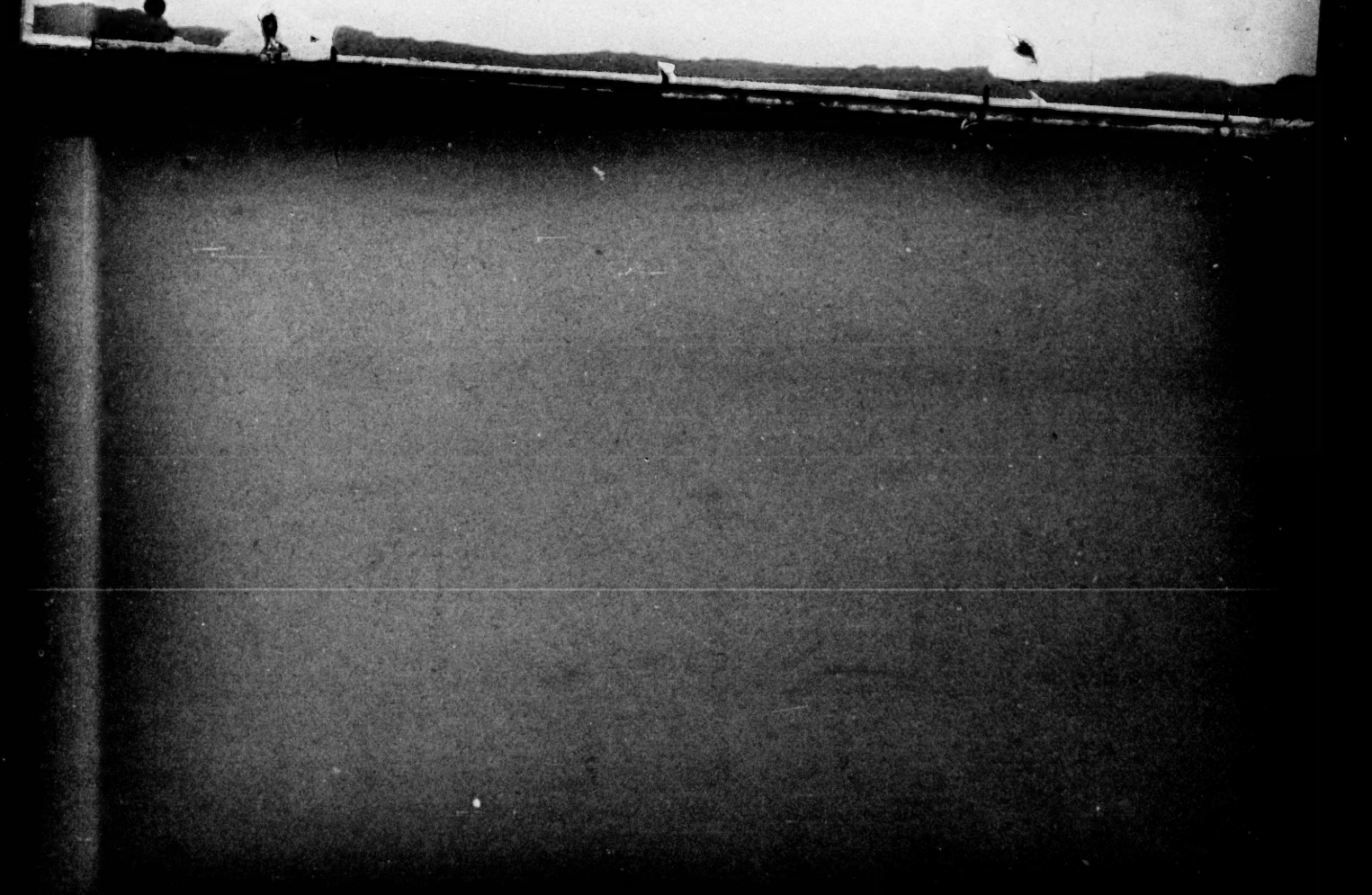
Of Counsel for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES.

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vs.

ALICE LENORA CLEMENTS' ADMINISTRATOR ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT OF THE CASE.

This was an action at law, brought by Alice L. Wall (afterwards Clements), on a policy of insurance dated December 23, 1880, for $5,000, issued by the Equitable Life Assurance Society of the United States, plaintiff in error, and defendant below, upon the life of Samuel E. Wall, for the benefit of said Alice L. Wall, his wife (Printed Record, pp. 7–12).

In

The defense was that plaintiff had forfeited all rights under the policy, because (1) default was made in payment of the annual premium due December 15, 1883, and (2) the conditions in such case prescribed in the policy for applying the reserve thereon, computed according to the New York standard, to the purchase of a paid-up policy, were not complied with.

Such default and failure to comply with the further provisions of said policy were admitted. But plaintiff claimed that said provisions for commutation in case of default were not binding, being superseded and annulled by the provisions of Sections 5983 and 5985 of the Revised Statutes of Missouri, 1879, concerning the forfeiture of life policies; and that under said statute she was entitled to apply the net value of said policy, computed as prescribed by said statute, to the purchase of temporary insurance to the full amount insured, — which would have continued said policy in force till August 30, 1886.

The following is a copy of said provisions of Sections 5983 and 5985 of said Revised Statutes, so far as pertinent, or relied on by plaintiff, in this case; being the same provisions referred to in the opinion of his Honor Judge Brewer, hereinafter set out at large (*infra*, p. 17).

"SEC. 5983. *Policies non-forfeitable, when.*— No policy of insurance on life hereafter issued by any life insurance company, authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums be forfeited or become void, by reason of the non-payment of premium thereon, but it shall be subject to the following rules of commutation, to wit: The net value of the policy when the premium becomes due and is not paid, shall be computed upon the American experience table of mortality, with four and one-half per cent. interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on ac-

count of past premium payments on said policy issued to the insured, which indebtedness shall then be canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium and the assumption of mortality and interest aforesaid: " * * *

" SEC. 5985. *Rule of payment on commuted policy.*—If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section five thousand nine hundred and eighty-three, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy the same as if there had been no default in the payment of premium, any thing in the policy to the contrary notwithstanding; provided, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured;" * * *

Under this contention two questions arose, namely:—

1. Whether the contract sued on is governed or to be construed by the laws of the State of New York or by the laws of the State of Missouri?

2. If subject to the laws of Missouri, are the stipulations in said policy and the application therefor, in respect of forfeiture, valid and binding on plaintiff as a waiver of the provisions of the Missouri statute?

These questions were directly presented to the court below by the plaintiff's motion to strike out certain parts of defendant's answer. Said motion was argued before his Honor, D. J. Brewer, Circuit Judge, who sustained it: holding (1) that the policy sued on was a contract governed and to be construed by the Missouri statute, and (2) that the express stipulation contained in said policy and the application

therefor, waiving the provisions of the Missouri statute and adopting the mode of commutation prescribed in the policy, was not valid or binding on plaintiff. Said ruling, and defendant's exceptions thereto, are fully preserved in this record.

The cause was afterwards tried, in accordance with this ruling, before his Honor, A. M. Thayer, District Judge, a jury being waived: the same questions, in effect, being presented by defendant's objections to testimony, all overruled, and its request for declarations of law, which was refused, — all which are preserved in the record. No testimony was offered for defendant, and no declaration of law asked for by plaintiff.

The questions presented for the consideration of this Court are those above stated, and are decisive of the cause.

On January 21, 1884, said Samuel E. Wall died. On August 15, 1884, Alice L. Wall, his widow, beneficiary in said policy, brought this suit in the Circuit Court of Henry County, State of Missouri, to September term, 1884, of said court. Said defendant (plaintiff in error) having been duly served with process returnable to said September term, on the first day thereof presented its petition and bond according to law for the removal of said cause to the Circuit Court of the United States for the Eastern (Central) Division of the Western District of Missouri, on the ground that the controversy therein was between citizens of different States; which order was made and said cause removed accordingly, and transcript filed in said court on November 17, 1884 (Pr. Rec., pp. 9–11: 3–4).

On March 25, 1887, pursuant to stipulation filed, said cause was by said court ordered to be transferred to the Circuit Court of the United States for the Western Division of said Western District of Missouri; and on May 4, 1887,

there was filed in the office of the clerk of said last mentioned court a transcript of the record entries and proceedings theretofore had in said cause (Pr. Rec., pp. 6–7: 3).

On January 11, 1888, it was suggested to said Circuit Court of the United States for the Western District of Missouri (Western Division), that said plaintiff Alice L. Wall had intermarried with one Henry Q. Clements, and said action was by consent revived in the names of Alice Lenora Clements (formerly Wall) and Henry Q. Clements, her husband, against said defendant (plaintiff in error) and appearance of said Henry Q. Clements entered therein.

On January 12, 1888, in said court last mentioned, said cause was tried before the Honorable Amos M. Thayer, District Judge, a jury being waived, and judgment rendered against said defendant (plaintiff in error) for the sum of $6,125 and costs. On the same day, defendant's motion for a new trial was submitted and overruled, bill of exceptions allowed and filed, writ of error sued out and citation served, and so said cause comes to this court (Pr. Rec., p. 34).

At this October term, 1890, of this Court, on January 9, 1891, the death of said Alice Lenora Clements was suggested and by consent said cause was revived in the name of Benjamin F. Pettus, administrator of said Alice L. Clements, and Henry Q. Clements, defendants in error.

Proceedings to and including trial.

On December 12, 1885, was filed by plaintiff in the Circuit Court of the United States for the Western District of Missouri (Central Division), an amended petition, containing three counts.

On February 9, 1886, was filed therein by consent the answer of the defendant below (plaintiff in error) to said amended petition.

On March 2, 1886, was filed therein plaintiff's motion to strike out certain parts of defendant's answer, which motion was argued and submitted, to wit, in said Circuit Court of the United States for the Western District of Missouri (Western Division) on July 1, 1887, and on October 17, 1887, was sustained, and said portions of said answer of defendant in said motion mentioned (below printed in italics) ordered to be stricken out, to which ruling and order of said court said defendant then and there duly excepted (Pr. Rec., pp. 31–34).

At the trial on January 12, 1888, said plaintiffs dismissed as to the first count and the third count of said amended petition, and said cause was tried on the issues, and no other, presented by the second count of said amended petition and defendant's answer to said second count, which are respectively below set forth.

Following are the said amended petition, to-wit, the said second count thereof, the first and third counts thereof being omitted, and the defendant's answer thereto, to-wit, to the said second count thereof, the remainder of said answer being omitted: the portions of said answer below printed in italics being those portions thereof which were stricken out as above stated on motion of plaintiffs. (Pr. Rec., pp. 16; 18-19; 21; 22-26; 32-33.)

Amended petition.

ALICE L. WALL, *Plaintiff*,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Defendant*. } No. 1875.

The plaintiff, for amended petition, states that defendant is a corporation duly created and existing under the

laws of the State of New York for the purpose of doing a life insurance business, and has power to issue policies of insurance on the lives of persons.

* * * * * * * *

For a second count the plaintiff states that the defendant is a corporation duly created and existing under the laws of the State of New York for the purpose of doing a life insurance business, and has power to issue policies of insurance on the lives of persons, and is doing business as a life insurance company in the State of Missouri and is subject to the laws of said State.

Plaintiff alleges that heretofore, to wit, on the 23d day of December, 1880, in consideration of the sum of one hundred and thirty-six dollars and twenty-five cents, to the defendant paid by Samuel E. Wall, and in consideration of the further agreement on the part of said Samuel E. Wall to pay to the defendant an annual premium of $136.25, payable on or before the 15th day of December in each year during the continuance of said contract, the said defendant made, executed and delivered to said Samuel E. Wall, who was then and at all the times hereinafter mentioned a resident of the State of Missouri, and in which State the said policy was delivered and the said premiums paid, its contract and policy of insurance which is herewith filed, by the terms of which the said defendant, in consideration of the payment and agreement aforesaid on the part of the said Samuel E. Wall, did promise and agree to pay to plaintiff, Alice Lenora Wall, the wife of the said Samuel E. Wall, for her sole use, if living, the sum of five thousand dollars within sixty days after satisfactory proofs of the death of said Samuel E. Wall should be furnished to defendant at its office in New York city.

Plaintiff alleges that the said Samuel E. Wall paid the annual premiums on said policy for the years 1881 and 1882, when due, in addition to the premium paid at the time when said policy was issued, making three full annual payments of premium; that by virtue of said three payments the said policy on said 15th day of December, 1883, had acquired a net value, and was on said day worth the sum of $161.05, as computed upon the American Experi-

ence Table of Mortality, with four and one-half per centum per annum interest; that neither the said Samuel E. Wall nor the plaintiff were at that time indebted to the defendant on account of any past premiums on said policy nor on any other account; that the age of said Samuel E. Wall at that time was 39 years; that three-fourths of such net value of said policy, applied and taken as net single premium for temporary insurance for the amount written in said policy, entitled said Samuel E. Wall to a temporary insurance for said amount for a term expiring the 30th day of August, 1886, and the said policy was by reason of the premises and of the provisions of the statutes of the State of Missouri in such cases made and provided, kept and continued in full force and effect until said 30th day of August, 1886.

Plaintiff further states that on the 21st day of January, 1884, and during the term of said temporary insurance, and while the said policy thereunder was in full force and effect, the said Samuel E. Wall died; that soon after the death of said Samuel E. Wall, to wit, on the 28th day of January, 1884, the plaintiff notified the defendant of the death of said Samuel E. Wall, which notice was duly received by defendant; that no formal proofs of such death have been made for the reason that the defendant has denied and still denies all liability under said policy, and has thereby waived any other, further, or formal proofs of the death of said Samuel E. Wall.

Plaintiff alleges that she and the said Samuel E. Wall have fully complied with all the conditions of said policy and contract on their respective parts.

Plaintiff alleges that she was the wife and is now the widow of said Samuel E. Wall.

Plaintiff says that by reason of the premises the defendant has become and is now indebted to her in the sum of five thousand dollars, with interest at the rate of six per centum per annum from said 21st day of January, 1884, and for which amount, with costs, she asks judgment against the defendant.

Defendant's answer.

Alice L. Wall, Plaintiff, *vs.* The Equitable Life Assurance Society of the United States, Defendant.	Law Cases. No. 1875.

* * * * * * * * * * * *

Further answering said amended petition, to wit, the allegations contained in the second count thereof, this defendant admits —

That it is a corporation as alleged.

That defendant, on the 23d day of December, 1880, at the city and State of New York, executed a contract in writing, being a policy of insurance on the life of Samuel E. Wall, whereby, for the considerations and upon the conditions therein stated and not otherwise, this defendant promised to pay to Alice L. Wall, wife of Samuel E. Wall for her sole use, if living, in conformity with the statutes of the State of New York, the sum of $5,000 (any indebtedness to the society, to wit, this defendant, on account of said contract to be first deducted therefrom), at the office of the said society, this defendant, in the city of New York, to wit, in the State of New York, within sixty days after satisfactory proofs of the death of said Samuel E. Wall shall have been furnished to the society, to wit, this defendant, at its said office.

Whether the contract and policy of insurance filed with plaintiff's petition, as alleged, is the original policy of insurance executed by defendant, as above admitted, defendant has not knowledge or information sufficient to form a belief and craves inspection thereof when produced at the trial of this cause, and prays leave to refer to said original instrument by it executed for all and singular the terms and conditions of said contract.

But defendant avers that the contract or policy of insurance, the execution whereof by defendant is alleged in the first count of plaintiff's amended petition and is above admitted, and the contract or policy of insurance, the execution whereof by defendant is also averred in the second count of plaintiff's petition in this cause as amended and is

also above admitted are one and the same instrument and policy of insurance, and that defendant never executed or delivered to any person any contract or instrument purporting to insure the life of said Samuel E. Wall, except that one instrument or policy of insurance mentioned and referred to in said first count and also in said second count of said petition.

Further answering said second count or alleged cause of action, defendant admits that said Samuel E. Wall was a resident of the State of Missouri, and that said original instrument or policy of insurance, after being applied for to and executed by the defendant, as hereinafter stated, was, at the request of the said Wall, transmitted to the State of Missouri and was delivered to said Wall in said State.

But defendant states that said policy was executed for it, the said society, defendant, by the president and secretary thereof, at the chief office of said defendant, in the city of New York, in the State of New York, under the laws of which State defendant is incorporated, and that by the terms of said policy the several annual premiums payable thereunder were agreed to be paid and were payable at the said office of the defendant in said State of New York and not elsewhere, it being, however, in said policy provided that at the pleasure of the said society, defendant, suitable persons might be authorized to receive such payments at other places, but only on the production of the society's receipt therefor, signed by the president, vice-president, actuary, secretary, or assistant secretary, and countersigned by the person to whom such payment was made, and that no payment made to any person, except in exchange for such receipt, would be recognized by the society.

That by the said policy it was further provided that the said sum of $5,000, which, upon the conditions aforesaid and in said contract set forth and not otherwise, said society promised to pay to said Alice L. Wall, was to be paid if and when the same should become due and payable at the said office of this defendant in the city of New York and State of New York.

And defendant avers that the said contract of defendant, being so by it executed and so by it to be performed in the State of New York, was a contract under and to be construed

and governed by the laws of the said State of New York and not by the laws of any other State, nor was nor is said contract or defendant's obligation thereunder within the purview of any law of the State of Missouri touching policies of insurance on life nor subject to be modified or affected thereby.

Further answering said second count of said petition, defendant states that said policy was issued and executed by this defendant as aforesaid upon and in pursuance of an application in writing therefor to this defendant, dated December 15th, 1880, signed by said Samuel E. Wall as the person whose life was to be assured therein, and by the plaintiff Alice L. Wall, as the person for whose benefit said assurance was to be made; that in and by said application it was declared and agreed by said plaintiff and said Samuel E. Wall that all the statements and answers written therein were warranted to be true and were offered to this defendant as a consideration of the contract, to wit, of the policy of insurance thereby applied for and which was executed by defendant, as aforesaid, upon the faith and in consideration of said application, and that in and by said policy of insurance it was expressly declared and agreed that the contract between the parties thereto — that is to say, between the defendant, on the one hand, and said Samuel E. Wall and this plaintiff, on the other hand — was completely set forth in said policy and the said application therefor taken together, and that none of its terms could be modified nor any forfeiture under it waived except by an agreement in writing signed by the president, vice-president, actuary, secretary, or assistant secretary of the society, to wit, this defendant.

Defendant further states that among other statements and answers written on said application was one by which said Samuel E. Wall did, in consideration of the agreements contained in the policy thereby applied for, to wit, in the said policy of insurance executed by this defendant, as aforesaid, under date of December 23d, 1880 (being the agreement in said policy hereinafter fully set forth providing for paid-up insurance in the event of the surrender of the policy at certain periods and under certain conditions specified) waive and relinquish all right or claim to any

other surrender value than that so provided, whether required by a statute of any State or not.

Defendant further states that said agreement last above mentioned and contained in said policy, and in consideration of which agreement said Samuel E. Wall so waived and relinquished as aforesaid all right or claim to any other surrender value than that so provided, was in the words following, to wit: —

"And, further, that if premiums upon this policy for not less than three complete years of assurance shall have been duly received by said society and this policy should thereafter become void in consequence of default in payment of a subsequent premium, said society will issue in lieu of such policy a new paid-up policy, without participation in profits, in favor of said Alice L. Wall, if living, and if not living, to the children of said Samuel E. Wall, or their guardian for their use, or if there be no children surviving, then to the executors, administrators, or assigns of said Samuel E. Wall, for the entire amount which the full reserve on this policy, according to the present legal standard of the State of New York, will then purchase as a single premium, calculated by the regular table for single-premium policies now published and in use by the society: Provided, however, that this policy shall be surrendered duly receipted within six months of the date of default in payment of premium as mentioned above."

And defendant avers that even if said policy of insurance and this defendant's contract therein or obligation thereunder had otherwise been within the purview of or subject to be modified or affected by any provision of any law of the State of Missouri touching policies of insurance on life (which defendant denies), yet by reason of the premises the plaintiff is estopped from claiming the benefit of any provision of any law of the State of Missouri, if any such law there be, for any other or different surrender value or upon any other or different conditions from those in said policy stipulated for as above set forth, and further avers that said policy of insurance has never been surrendered or offered to be surrendered to this defendant.

Further answering said second count of said petition, defendant admits that the annual premiums due on said policy

on December 15th, 1881 and December 15th, 1882, were paid, as also the cash premium due when said policy was issued.

But denies that on December 15, 1883, said policy had acquired a net value of or was worth the sum of one hundred and sixty-one dollars and five cents ($161.05), as alleged, or that the age of said Samuel E. Wall at that time was thirty-nine years; denies that three-fourths of such alleged net value of said policy, applied and taken as a net single premium for temporary insurance for the amount written therein, would have purchased or that said Samuel E. Wall was on account thereof, as alleged, entitled to a temporary insurance for said amount for a term expiring August 30th, 1886, and denies that said policy was kept or continued in force or effect under or by reason of any statute of the State of Missouri or in any other manner after said 15th day of December, 1883.

Defendant further denies that notice of the death of said Samuel E. Wall was duly received by defendant, or that any proofs of the death of said Wall have ever been furnished to defendant, or that it has in any manner waived the proofs, formal or other, required by said policy, or has waived any requirement of said policy whatever, and denies that either plaintiff or said Samuel E. Wall have fully complied with all the conditions of said policy and contract on their respective parts, and on the contrary thereof avers that by reason of the non-payment of the annual premium due and payable under said policy on or before December 15th, 1883, and under the provisions of said policy the same was forfeited and defendant was after said date relieved from all obligations thereunder.

Defendant further denies knowledge or information sufficient to form a belief whether the plaintiff in this action was the wife or is the widow of said Samuel E. Wall, and denies that said defendant is indebted to plaintiff in any sum or on any account whatever.

Following is a copy of plaintiff's motion to strike out the portions of defendant's answer to the second count of said petition, which was sustained by said court as above stated: —

Alice L. Wall, Plaintiff,

vs.

Equitable Life Assurance Society of the United States, Defendant.

No. 1875.

The said plaintiff comes now and moves the court to strike out all those portions of the defendant's answer embraced in bracket No. 1, being all the matter on lines 15 to 22, both inclusive, on page 6 of said answer, which is in words and figures as follows: —

"*And defendant avers that the said contract of defendant being so by it executed and so by it to be performed in the State of New York was a contract under and to be construed and governed by the laws of the said State of New York and not by the laws of any other State, nor was nor is said contract or defendant's obligation thereunder within the purview of any law of the State of Missouri touching policies of insurance on life nor subject to be modified or affected thereby.*"

And in bracket No. 2, being all the matter on page 7, from line 17 to the end; all of page 8, and on page 9 from line one to line 5, both inclusive, which is in words and figures as follows: —

Defendant further states that among other statements and answers written on said application was one by which said Samuel E. Wall did, in consideration of the agreements contained in the policy thereby applied for, to wit, in the said policy of insurance executed by this defendant as aforesaid, under date of December 23d, 1880 (being the agreement in said policy hereinafter fully set forth, providing for paid up insurance in the event of the surrender of the policy at certain periods and under certain conditions specified), waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not.

Defendant further states that the said agreement last

above mentioned and contained in said policy and in consideration of which agreement said Samuel E. Wall so waived and relinquished as aforesaid all right or claim to any other surrender value than that so provided, was in the words following, to wit:—

"And, further, that if premiums upon this policy for not less than three complete years of assurance shall have been duly received by said society, and this policy should thereafter become void in consequence of default in payment of a subsequent premium, said society will issue in lieu of such policy a new paid-up policy, without participation in profits in favor of said Alice L. Wall, if living, and, if not living, to the children of said Samuel E. Wall or their guardian for their use; or, if there be no children surviving then to the executors, administrators, or assigns of said Samuel E. Wall for the entire amount which the full reserve on this policy according to the present legal standard of the State of New York will then purchase as a single premium calculated by the regular table for single-premium policies now published and in use by the society; provided, however, that this policy shall be surrendered duly receipted within six months of the date of default in payment of premium as mentioned above."

And defendant avers that even if said policy of insurance and this defendant's contract therein or obligation thereunder had otherwise been within the purview of or subject to be modified or affected by any provision of any law of the State of Missouri touching policies of insurance on life (which defendant denies), yet, by reason of the premises the plaintiff is estopped from claiming the benefit of any provision of any law of the State of Missouri, if any such there be, for any other or different surrender value or upon any other or different conditions from those in said policy stipulated for as above set forth, and further avers that said policy of insurance has never been surrendered or offered to be surrendered to this defendant;

And for grounds assign:—

1. That the matter No. 1 is a mere conclusion of law, and as such is incorrect, as upon the allegation of the petition and the admissions contained in said answer the policy

sued on was subject to the provisions of the Missouri statute referred to.

2. That the matters embraced in said bracket No. 2 constitute no defense herein.

3. That said alleged waiver is void because contrary to public policy and to the policy and laws of this State, and is forbidden and declared null by the statutes of this State, to all of which the said policy was subject.

The opinion of the court sustaining said motion is in words and figures following (Pr. Rec., pp. 28–30). It is reported under the name of *Wall* v. *Equitable Life, etc.*, 32 Federal Reporter, 273.

Opinion.

Brewer, C. J.:

This case is submitted on a motion to strike out parts of the answer. Involved in this motion are two questions: First. Is the contract sued on governed and to be construed by the laws of the State of New York or by the laws of the State of Missouri? Second. If subject to the laws of Missouri, is the stipulation in respect to forfeiture legal and binding as a waiver of the provisions of the Missouri statutes? In respect to the first question these, I think, must be taken as the accepted facts: The defendant is a New York corporation, doing business in the State of Missouri. The insured was a citizen and resident of Missouri, and made his application here, which was forwarded to New York. The application was accepted, the policy fully prepared and signed in that State, and sent to Missouri and delivered to the applicant here. By the terms of the policy all premiums are payable at the defendant's office in New York. If the sum insured should become payable the payment is to be made at its office in New York. None of the terms of the policy can be modified except by one of the four general officers of the society, and no modification is claimed. Under these facts I have little doubt as to the true answer to be made to this first question. In White *v.* Insurance Company, 4 Dillon, 177, it was held that the act of the Legislature of the State of Missouri of

March 23, 1874, in respect to policies of life insurance extends to all policies delivered in this State after the act went into effect. That was a suit against a foreign insurance company doing business in this State. In Fletcher *v.* New York Insurance Company, 13 Fed. Rep., 526, it was held that a foreign insurance company cannot withdraw itself from the operation of the statutes of a State in which it does business by the insertion of clauses in its policies. That was a case in which the defendant company insisted that by virtue of certain clauses in the application the contract was to be finally and fully executed in New York. In his opinion, an opinion concurred in by the Circuit Judge McCrary, Judge Treat uses this language: "The defendant corporation, having been permitted to do business in Missouri under the statutes of the latter, was bound by all the provisions of those statutes, and could not by the insertion of any of the many clauses of its forms of application, etc., withdraw itself from the obligatory force of the statute. The contract of insurance, therefore, is a Missouri contract, and subject to the local law." This case was taken to the Supreme Court of the United States, and is reported — 117 U. S. 519. The case was there decided upon a different question, but in the statement of facts, which, as it appears, was prepared by the justice writing the opinion, appears this language: "The company is a corporation, under the laws of New York, but it also transacts business in Missouri through agents residing there, and of course, with reference to the business done in that State, is subject to its laws." In view of these authorities and considering the reasoning of Judge Treat in the opinion above referred to, I deem it unnecessary to discuss this question further, and simply hold that the Missouri statute controls. See also Ehrman *v.* Insurance Company, 1 McCrary, 123: *In re* Insurance Company, 22 Fed. Rep., 109; Paul *v.* Virginia, 8 Wallace, 168.

In respect to the second question the following are the two sections of the statutes which are applicable:—

Section 5983, 2 R. Stat.: "No policy of insurance on life hereafter issued by any life insurance company authorized to do business in this State on and after the first day of August, A. D. 1879, shall, after payment upon it of two

full annual premiums, be forfeited or become void by reason of the non-payment of premium thereon, but it shall be subject to the following rules of commutation, to wit." Then follows a statement of the mode of computing the amount payable in such case.

Section 5985. "If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section five thousand nine hundred and eighty-three, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy the same as if there had been no default in the payment of premium, any thing in the policy to the contrary notwithstanding." Now, in the policy sued on there is a non-forfeiture clause, but containing a different provision, and it is alleged that in the application the insured waived and relinquished all right or claim to any other surrender value than that provided in the policy, whether required by the statute of the State or not. This is the doubtful question. It is strenuously insisted by the defendant that the statute of Missouri neither forbids nor declares null nor makes anywise illegal such a waiver as the one in question; that it merely gives a right of privilege to the insured, which, like any other personal right or privilege, he may, for sufficient consideration, waive, and that such a waiver, not being forbidden by the statute, is not contrary to public policy in any such sense as that the court should refuse to enforce it. Back of this argument and strongly supporting it is that liberty of contract which courts are so strenuous to uphold. While I am constrained to hold adversely to the defendant, it is with grave doubts as to the correctness of my conclusion. In the first place, a technical argument can be made on the language of the statute. It says that the value of the policy shall be determined in a certain way, and then that if the death of the insured occur during the term of temporary insurance covered by the value of the policy thus determined the company shall be bound to pay the amount of the policy, "any thing in the policy to the contrary notwithstanding." This language is broad enough to include a waiver, and may be construed as meaning that no stipu-

lation, no waiver, no agreement for a different forfeiture — in fact, nothing that a party can put into a policy — shall defeat the right to recover the full amount if death occurs during this time of temporary insurance. Of course, this is a purely technical construction of the statute, and I am disposed to rest my conclusion more upon the matter of public policy; and here the history of insurance must be taken into consideration. It is notorious that many insurance companies were rigorous in insisting upon forfeiture, sometimes under very inequitable circumstances, and there was no little public clamor by reason thereof. Such clamor prompted many legislatures to interfere and seek by legislation to protect what they supposed the rights of the insured. Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule, applicable to all cases — absolute and universal — because if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive — in fact, no words of negation in any direction — yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce. R. R. Co. *v.* Peavy, 29 Kan., 169. The legislature has, by this language, declared a rule in respect to forfeitures in life insurance policies. It has thus established the policy which it believes should obtain in this State, and though sitting on the Federal bench, it is my duty to administer the laws of this State in the spirit in which they were enacted, and to uphold both their letter and their spirit. It is voluntary with any foreign insurance company whether it shall come into this State to transact business. Coming in, it should be willing to comply with all the statutes as to all business arising within this State, and no court, least of all a Federal court, should hasten to release it from this obligation. From these views and with this feeling I am constrained, though with grave doubts, to sustain the motion to strike out.

Testimony at the trial.

Following is the testimony which was offered by plaintiff at the trial of said cause on January 12, 1888, together with the objections made to parts thereof by defendant, and overruled by the court, and defendant's exceptions to said rulings (Pr. Rec., pp. 35–40).

Thereupon said plaintiffs, to sustain the issues on their part, to wit, the issues presented by the second count of said petition and defendant's answer thereto, offered the following testimony: —

(1.) An application in writing and print addressed to the Equitable Life Assurance Society of the United States, to wit, this defendant, and dated at Windsor, Missouri, December 15th, 1880, signed by Alice Lenora Wall as the person for whose benefit such assurance was applied, and by Samuel Everett Wall as the person whose life was to be assured, being an application for a policy of assurance on the life of said Samuel E. Wall for $5,000, premium payable annually.

It was admitted and agreed by both parties that said paper was the original application made to this defendant by Samuel E. Wall, named as the assured in the policy herein sued on, and by Alice L. Wall, his wife, one of the plaintiffs herein, and by them signed, and that said paper is the application referred to in the policy sued on and in the pleadings in this cause as being a part thereof.

It is agreed by the parties to this cause that said application contained, among other printed questions to be answered by the person making said application and for whose benefit the assurance was to be effected by the policy applied for, the following question, to wit:—

"27. Does the person for whose benefit the assurance is effected, in consideration of the agreements contained in the policy hereby applied for (providing for paid-up insurance in the event of surrender of the policy at certain periods and under certain conditions specified), waive and relinquish all right or claim to any other surrender value

than that so provided, whether required by a statute of any State or not?"

It is further agreed that in said application the said question above set forth was answered by the word "Yes" written against the same.

Also that the said application contained the following further statement over the signatures of the said Alice Lenora Wall, plaintiff herein, and said Samuel Everett Wall — that is to say: "It is hereby declared and agreed that all the statements and answers written on this application are warranted to be true and are offered to the society as a consideration of the contract, which shall not take effect until the first premium shall have been actually paid during the life of the person herein proposed for assurance."

(2) The policy sued on in this case and filed with the petition therein, a copy of which policy is as follows, including the provisions and requirements referred to and printed on the back of said policy as part thereof:—

The Equitable Life Assurance Society of the United States,

Premium $136.25. Amount, $5,000.

Age, 36. No. 227,711.

120 Broadway, New York,

In consideration of the application of this policy of insurance and of each of the statements made therein;

And in further consideration of the payment of the sum of one hundred and thirty-six dollars and twenty-five cents at the office of the society in the city of New York, at the date hereof, the receipt whereof is hereby acknowledged, and of the annual payment of one hundred and thirty-six dollars and twenty-five cents, to be made at the said office on or before the fifteenth day of December in every year during the continuance of this contract—

Does promise to pay to Alice L. Wall, wife of Samuel E. Wall, for her sole use, if living, in conformity with the statutes, and if not living, to the surviving children of said Samuel E. Wall, or their guardian for their use; or if there be no such children surviving, then to the executors, administrators, or assigns of said Samuel E. Wall, the sum of five thousand dollars (any indebtedness to the society

on account of this contract to be first deducted therefrom) at the office of the society in the city of New York, within sixty days after satisfactory proofs of the death of said Samuel E. Wall, of Windsor, in the county of Henry, State of Missouri, shall have been furnished to the society at its said office.

And the said society does hereby further promise and agree that after three years from the date hereof the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums at the times and place and in the manner herein stipulated, and that the regulations of the society as to age, residence, travel, occupation and employments shall be observed, and that in all other respects, after the expiration of said three years, the liability of the said society under this policy shall not be disputed.

And, further, that if the premiums upon this policy for not less than three complete years of assurance shall have been duly received by said society and this policy should thereafter become void in consequence of default of payment of a subsequent premium, said society will issue, in lieu of such policy, a new paid-up policy, without participation in profits, in favor of said Alice L. Wall, if living, and if not living, to the children of said Samuel E. Wall, or their guardian for their use; or if there be no children surviving, then to the executors, administrators, or assigns of said Samuel E. Wall for the entire amount which the full reserve on this policy, according to the present legal standard of the State of New York, will then purchase as a single premium, calculated by the regular table for single-premium policies now published and in use by the society: Provided, however, that this policy shall be surrendered, duly receipted, within six months of the date of default in payment of premium, as mentioned above.

This policy is issued and accepted upon the condition that the provisions and requirements printed or written by the society upon the back of this policy are accepted by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In witness whereof the Equitable Life Assurance Society of the United States has caused this policy to be signed by its president and secretary, at the office in the city of New

York, the twenty-third day of December, A. D. one thousand eight hundred and eighty.

(Signed) G. W. PHILLIPS,
Acting President.

(Signed) W. ALEXANDER,
Secretary.

For a wife.

G. 80.

No person except the president, vice-president, actuary, secretary or assistant secretary is authorized to make, alter or discharge contracts or waive forfeitures.

The provisions and requirements in said policy referred to as printed upon the back thereof, so far as material or read in evidence in this cause, were the following:—

"4. All premiums are due in the city of New York at the date named in the policy; but at the pleasure of the society, suitable persons may be authorized to receive such payments at other places, but only on the production of the society's receipt therefor, signed by the president, vice-president, actuary, secretary or assistant secretary, and countersigned by the person to whom the payment is made. No payment made to any person, except in exchange for such receipt, will be recognized by the society. All premiums are considered payable annually in advance. When the premium is made payable in semi-annual or quarterly installments, that part of the year's premium, if any, which remains unpaid at the maturity of this contract, shall be regarded as an indebtedness to the society on account of this contract and shall be deducted from the amount of the claim; and if any premium or installment of a premium on this policy shall not be paid when due, this policy shall be void; nevertheless, nothing herein shall be construed to deprive the holder of this policy of the privilege to demand and receive paid-up insurance in accordance with the agreement contained in this policy.

"5. The contract between the parties hereto is completely set forth in this policy and the application therefore, taken together, and none of its terms can be modified, nor any forfeiture under it waived except by an agreement in writing, signed by the president, vice-president, actuary,

secretary or assistant secretary of the society, whose authority for this purpose will not be delegated."

(3) Receipts from the Equitable Life Assurance Society, defendant herein, for the annual premium due and payable on said policy in December, 1881, and December, 1882, the payment of which premiums respectively at said dates was admitted by the defendant.

(4) A notice from the defendant company to Samuel E. Wall, dated November —, 1883, that the annual premium on said policy for the year 1883, would be due and payable on December 15, 1883, as provided for in said policy, the gross amount of said premium being one hundred and thirty-six dollars and twenty-five cents, less dividend of twenty dollars and seventy-four cents, the net amount of said premiums payable December 15th, 1883, leaving one hundred and fifteen dollars and fifty-one cents, which notice it was admitted by defendant was sent by it to said Samuel E. Wall at the date thereof.

(5) A letter dated St. Louis, January 30th, 1884, to the plaintiff from J. S. Kendrick, who is admitted by the defendant to have been its agent at St. Louis at said date, which letter is as follows: —

"St. Louis, Jan'y 30th, 1884.

Mrs. S. E. Wall, Henrietta, Mo.

Dear Madam: Your letter of the 28th inst. received. Mr. J. M. Wall has advised me of the death of your husband, and I have written the society submitting the facts. What action they will take I do not know, but I am sure they will do what they believe to be best. I will advise you when I hear from the society.

Yours resp'y,

(Signed) J. S. KENDRICK."

(6) A letter to plaintiff dated St. Louis, February 12th, 1884, also from J. S. Kendrick, admitted by the defendant to have been its agent at said date, which is as follows: —

"St. Louis, Feb'y 12th, 1884.

Mrs. S. E. Wall, Henrietta, Mo.

Dear Madam: The society informs me that the committee on claims have duly considered the correspondence

relating to policy No. 277,711, and say: "While not recognizing any claim whatever under the policy, we are disposed to act with liberality and treat it in a moral light, and in keeping therewith we are ready to allow the value of the paid-up policy applied for by Mr. Wall during his lifetime, the details of which, we presume, were not consummated by him on account of his illness. The value of the paid-up policy was $366, and if the beneficiary is ready to accept the offer you may furnish blank proofs, and upon their receipt, if satisfactory, we will pay the amount immediately.

Please let me know your decision.

Y'rs resp'y,

(Signed) J. S. KENDRICK, *Cashier*.

(7.) Deposition of plaintiff, *Alice L. Clements*, as follows:—

"My name is Alice L. Clements. I was married to Henry Q. Clements on the 24th day of July, 1887, at Johnson county, Missouri. Previous to my marriage with said Clements I was the widow of Samuel E. Wall. I was married to Samuel E. Wall on the 1st day of October, 1868, at the county of Pettis, in the State of Missouri. Said Samuel E. Wall was the identical person whose life was insured by the Equitable Life Assurance Society of the United States, by its policy dated December 23d, 1880, for the sum of five thousand dollars. Said Samuel E. Wall died on the 21st day of January, 1884. He was taken sick on the 6th day of Dec., 1883. Said Samuel E. Wall at the time of his death was 39 years of age. The cause of his death, as affiant believes, was catarrhal bronchitis, resulting in pyæmia, and this affiant is the identical person named in said policy as beneficiary.

(Signed) ALICE L. CLEMENTS.

Defendant objected to so much of said deposition as tended to show the age of Samuel E. Wall at the time of his death as immaterial and incompetent; which objection was overruled by the court, and the court admitted all of said deposition. The defendant then and there excepted.

Also the deposition of *J. F. Robinson*, as follows: —

"My name is J. F. Robinson. I am a practicing physi-

cian, and was engaged in that business in January, 1884. I was well acquainted with Samuel E. Wall and with Alice L. Wall, his wife. I attended said Samuel E. Wall as his physician in his last illness.

Said Samuel E. Wall died on the 21st day of January, 1884. The cause of his death was catarrhal bronchitis, resulting in pyæmia.

(Signed) J. F. ROBINSON, M. D."

(8) Plaintiff then and there offered testimony tending to show the truth of the following allegations contained in the petition and each of them — that is to say: —

That said Samuel E. Wall paid the annual premiums on the said policy for the years 1881 and 1882 when due, in addition to the premium paid at the time said policy was issued, making three full annual payments of premiums; that by virtue of said three payments the said policy on said 15th day of December, 1883, had acquired a net value and was to said defendant worth the sum of $161.05, as computed by the American experience table of mortality, with four and one-half per cent. per annum interest; that neither the said Samuel E. Wall nor the plaintiff were at that time indebted to the defendant on account of any past premiums on said policy nor on any other account; that the age of said Samuel E. Wall at that time was thirty-nine years; that three-fourths of such net value of said policy, applied and taken as a net single premium for temporary insurance for the amount written in said policy, entitled said Samuel E. Wall to a temporary insurance for said amount for the term expiring on the 30th day of August, 1886, under the rule set forth in section 5983 of the Revised Statutes of Missouri of 1879.

Defendant's counsel admitted that the testimony offered by plaintiffs in support of said several allegations did tend to show and establish the same, and if received would sufficiently prove said allegations to be true, but defendant objected to the admission of any testimony tending to show the net value of said policy on December 15th, 1883, as computed by the American experience table of mortality, with four and one-half per cent. per annum interest, or as computed in accordance

with the said statute of Missouri; also to any evidence as to the age of said Samuel E. Wall at the time of his death; also to any evidence tending to show that three-fourths of the net value of said policy, computed as above stated and taken as a net single premium, would purchase or pay for a temporary insurance for said amount for any or what period. All said objections are on the ground that the said testimony offered by plaintiff was immaterial, irrelevant, and incompetent under the terms and conditions of the policy sued on in this case, because said policy is to be construed by the law of the State of New York, and also because in and by the application for said policy said plaintiff waived the benefit of any provisions of any statute of Missouri.

All of said objections were then and there overruled by the court and all of the said testimony so offered by the plaintiff was then and there admitted against defendant's objections; to which ruling and action of the court said defendant then and there excepted.

This was all the testimony offered by said plaintiffs to support the issues on their part.

No testimony was offered by the defendant at said trial.

Declarations of law prayed for by defendant and refused.

Thereupon the defendant prayed the court to grant the following instructions or declarations of law in said cause, that is to say (Pr. Rec. p. 41): —

Henry Q. Clements and Alice L. Clements, Plaintiffs,

vs.

The Equitable Life Assurance Society of the United States, Defendant.

No. 1296. Law Cases.

1. Defendant prays the court, in the above entitled cause, to declare the law as follows: —

That under the terms and conditions of the policy sued on in this case the contract of assurance in and by said policy made by the defendant is a contract governed and to be construed by the laws of the State of New York and is not to be governed or to be construed by the laws of the State of Missouri.

2. Defendant prays the court in the above entitled cause to declare the law to be that on the pleadings and evidence the plaintiff is not entitled to recover any thing upon the second count in the petition herein.

3. Defendant in the above entitled cause prays the court to declare the law as follows:—

That the following condition and provision contained in the policy herein sued on, namely:—

"And, further, that if premiums upon this policy for not less than three complete years of assurance shall have been duly received by said society, and this policy should thereafter become void in consequence of the default in payment of any subsequent premium, said society will issue in lieu of said policy a single paid-up policy, without participation in profits, in favor of said Alice L. Wall, if living, and if not living, to the children of said Samuel E. Wall or their guardian for their use, or if there be no children surviving, then to the executors, administrators, or assigns of said Samuel E. Wall for the entire amount which the full reserve on this policy, according to the present legal standard of the State of New York, will then purchase as a single premium, calculated by the regular table for single premium policies now published and in use by the society: Provided, however, That this policy shall be surrendered, duly receipted, within six months of the date of default in payment of premium, as mentioned above," was and is a valid condition of said policy, binding upon the assured therein, and that said condition was not nor is modified or abrogated by any law of the State of Missouri in force at the date of said policy.

4. The defendant in the above entitled cause asks the court to declare the law as follows:—

If the court, sitting as a jury, shall find from the evidence that the policy herein sued on was issued by the defendant

upon and in pursuance of an application in writing therefor, signed by Samuel E. Wall, the assured therein, and Alice Lenora Wall, plaintiff in this suit; and shall further find from the evidence that in said application, so signed by them, was contained, among other things, the following question: —

"Does the person, in consideration of the agreements contained in the policy hereby applied for (providing for paid-up insurance in the event of surrender of the policy at certain periods and under certain conditions specified), waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not?"

And the court, sitting as a jury, shall further find that to said question, so contained in said application, the answer "Yes" was written therein over said signature to said application;

And the court, sitting as a jury, shall further find that said application, so signed as aforesaid, further contained the following statements, to wit: "It is hereby declared and agreed that all the statements and answers written on this application are warranted to be true and are offered to the society as a consideration of the contract, which shall not take effect until the first premium shall have been actually paid during the life of the person herein proposed for assurance;"

And if the court, sitting as a jury, shall further find that said application, so signed and containing the statements above mentioned, was by said plaintiff or her consent delivered to the defendant as and for the application of said policy and that said policy herein sued on was issued by the defendant upon the faith and in pursuance of said application —

Then the court declares the law to be that said Alice L. Clements (formerly Wall), plaintiff herein, did thereby waive and relinquish any benefit of or claim against this defendant under said policy based or which might be based upon any provisions of any statute of the State of Missouri substantially differing from or inconsistent with the agreements contained in the policy herein sued on in respect of the terms upon which, in case of default in pay-

ment of premium, the said beneficiary would be entitled to a new paid-up policy; and in such case, if the court, sitting as a jury, shall further find that an annual premium on said policy became payable to defendant under the terms thereof on the 15th day of December, 1883, and that such premium was not paid as by said policy provided for; and shall further find that the policy herein sued on was not surrendered to the defendant, and that no offer was made by said plaintiff to surrender the same within six months from the date of said default in payment of said premium, then the plaintiff is not entitled to recover any thing in this action.

Each and all of said instructions or declarations of law so asked for by defendant were by the court refused; to which action of the court in refusing said instructions and each of them said defendants then and there excepted.

Thereupon said cause was submitted, and the court, sitting as a jury, rendered its verdict in favor of plaintiff and against defendant, and assessed the damages in favor of plaintiff in the sum of $6,125, being the amount insured in said policy, to wit, $5,000, together with interest at the rate of 6% per annum from sixty days after February 12th, 1884, the date of defendant's refusal to pay said loss.

Defendant's motion for a new trial.

On the same day defendant filed and submitted its motion for a new trial of said cause, which was in the words and figures following (Pr. Rec., p. 43):—

Now comes said defendant and moves the court to set aside the verdict rendered in favor of said plaintiffs by the court, sitting as a jury, in the above entitled cause, and to grant defendant a new trial in said cause for the reasons following: —

Because the court erred at the trial of said cause in admitting, against defendant's objection, immaterial, irrelevant and incompetent testimony offered by the said plaintiffs.

Because the court erred at said trial in refusing proper instructions or declarations of law prayed for by defendant.

Because upon the pleadings and evidence in said cause the verdict should have been for the defendant.

Because there was no testimony offered by plaintiff tending to show that the annual premium due on December 15th, 1883, under the terms of the policy sued on, was paid or tendered as provided for by said policy; nor was any testimony offered by plaintiffs tending to show that the plaintiff, Alice L. Clements (formerly Wall), beneficiary therein, at any time complied with the conditions prescribed in said policy, in case of a default of payment of any annual premium, with respect to obtaining a paid-up policy.

Because it appeared from plaintiff's own testimony that under the terms of the policy sued on said plaintiff, Alice L. Clements, at and before the death of said Samuel E. Wall, had forfeited all right under said policy to recover the amount insured thereby or any part thereof, and that this defendant was not liable in this action for any sum under or by reason of its covenants in this policy.

Which motion was then and there overruled by the court, the defendant then and there duly excepting.

Thereupon and on the same day, defendant sued out its writ of error from this court, supersedeas bond in the sum of $13,000 was filed and approved, citation issued and due service thereof acknowledged on said day by said defendants in error.

SPECIFICATION OF ERRORS RELIED ON.

Following is a specification of the several errors committed by the court below which are asserted and intended to be urged by plaintiff in error in this court, namely:

The said Circuit Court erred —

1. In sustaining the motion of plaintiff below to strike out certain portions of defendant's answer to plaintiff's amended petition: being the portions of said answer which are set forth in said motion, on pages 32–3 of the printed record in this cause, and which are printed in italics in the copy of the answer to the second count of said petition on pages 10–12, *supra*, to which reference is made:

2. In admitting, against the defendant's objection and exception, so much of the deposition of the plaintiff Alice L. Clements, as tended to show that Samuel E. Wall at the time of his death was 39 years of age: said testimony being immaterial and incompetent. Said deposition is given on page 39 of the printed record and is copied in full on page 25, *supra*, to which reference is made:

3. In admitting, against the objection and exception of defendant, the testimony offered by plaintiff tending to show the net value, on December 15, 1883, of the policy sued on as computed by the American experience table of mortality, with four and a half per cent. interest per annum, or as computed in accordance with Section 5983 of the Revised Statutes of Missouri, 1879: also all testimony offered by plaintiff as to the age of Samuel E. Wall at the time of his death: also all testimony offered by plaintiff tending to show that three-fourths of the net value of

said policy computed as above stated and taken as a net single annual premium, would purchase or pay for a temporary insurance for the sum of $5,000, being the amount written in said policy, for any or what period: all said objections being on the ground that the said testimony was immaterial, irrelevant and incompetent under the terms and conditions of the policy sued on because said policy is to be construed by the law of the State of New York, and also because in and by the application for said policy said plaintiff waived the benefit of any provisions of any statute of Missouri.

The testimony last mentioned is given on page 40 of the printed record and is also copied in full in this statement on page 26 *supra*, to which reference is here made for the same.

4. In refusing, at the trial of said cause, to grant the several instructions or declarations of law asked by the defendant, and each of them: being the several instructions numbered respectively 1, 2, 3 and 4, hereinbefore set out at large on pages 27 to 30 *supra*, to which reference is made for the same.

5. In overruling the defendant's motion for a new trial of said cause, filed and submitted on the same day when the verdict for plaintiff was rendered: which motion is hereinbefore set out at large, on pages 30–31 *supra*, to which reference is here made for the same.

ARGUMENT FOR PLAINTIFF IN ERROR.

This case turns upon two questions of law, already stated *supra*, p. 3. Both were decided in the Circuit Court adversely to the defendant below, in the rulings here assigned for error.

In effect, the decision of the circuit judge sustaining plaintiff's motion to strike out certain parts of defendant's answer, was alone decisive of the cause, the exceptions taken at the trial being intended to preserve in the record and present clearly to this court the two ultimate questions referred to. These are: —

1. Whether the policy here sued on is a contract governed and to be construed by the laws of the State of New York or by the laws of the State of Missouri?

2. If by the laws of Missouri, then are the stipulations in said policy and the application therefor, in respect of forfeiture, valid and binding on plaintiff as a waiver of the provisions of section 5983 of the Missouri statute?

If either of these questions was erroneously decided in favor of the plaintiff below, the judgment should be reversed.

For if it be held that said policy was a contract governed and to be construed by the laws of New York, and not by section 5983 of the Missouri statute, then, under the facts admitted and the express stipulation of the policy in the event of default in payment of an annual premium, the plaintiff was not entitled to recover.

And although it were held that said contract was governed and to be construed by the laws of Missouri, yet if it be also held that the express agreement in said policy

and application therefor (made part thereof) waiving all right or claim to paid-up insurance other than that provided for in the policy *whether required by a statute of any State or not*, was valid and binding on said plaintiff, then also plaintiff was not entitled to recover.

It is contended for plaintiff in error that the Circuit Court erred in deciding each of said questions adversely to the defendant below: in support of which, the following considerations are submitted.

I.

Upon the pleadings and proof, the policy here sued on was a contract governed and to be construed by the laws of the State of New York, and not by the laws of the State of Missouri.

From the pleadings and proof, the following material facts appear:—

1. The plaintiff in error is a life insurance corporation, organized under the laws of the State of New York, having its chief office in the city of New York in said State.

2. The policy sued on was completely executed by plaintiff in error at said city of New York, in pursuance of a written application therefor signed by Samuel E. Wall, the assured, and the plaintiff Alice L. Clements (formerly Wall), then his wife, both of whom were residents of Missouri; and after being so executed in New York was, at their request, transmitted and delivered to said Samuel E. Wall in Missouri.

3. By the express terms of said contract said application was made part thereof, all statements and answers therein being warranted true and offered to said society as a consideration therefor.

In and by said application it was stated that said Alice L. Wall, in consideration of the agreements contained in

said policy, providing for paid-up insurance in the event of the surrender of the policy at certain periods and under certain conditions therein specified, did "waive and relinquish all right or claim to any other surrender value than that so provided, *whether required by a statute of any State or not.*"

4. Among other express provisions of said policy were the following:—

That all premiums should be payable at the society's office in the city of New York; but at the pleasure of the society, suitable persons might be authorized to receive such payments at other places, but only on producing the society's receipt therefor signed by some one of certain designated officers thereof, and countersigned by the person to whom such payment was made, and no payment made to any person except in exchange for such receipt to be valid.

That if the sum insured thereby should become payable to the beneficiaries therein, said society would pay the same at its office in the city of New York, within the period and upon the conditions stated: *provided* that if the premiums thereon for not less than three complete years of assurance should be duly received by said society, and said policy should thereafter become void for default of payment of a subsequent premium, *and provided further* that said policy should be surrendered duly receipted within six months of the date of such default, then said society would issue in lieu of said policy a new paid-up policy, without participation in profits, in favor of the beneficiary or beneficiaries therein named, for the entire amount which the full reserve on said policy according to the legal standard of the State of New York, at the date thereof, would then purchase as a single premium, calculated by the society's table for single-premium policies.

5. It was neither averred nor proved that by any agreement of any kind, either of the express provisions of said policy above mentioned was ever modified; nor that the delivery of the policy in Missouri, as averred in the petition, was any thing more or other than the manual transmission of the paper itself to Samuel E. Wall, the assured, who resided in said State; nor that either of the three premiums admitted to have been received by the society was paid elsewhere than at its office in the city of New York.

No question was or is made as to the validity, under the laws of New York, of any provision contained in said policy.

Upon the facts above stated, according to the established rules concerning the validity, interpretation and obligation of contracts, the agreements in this policy, being valid under the laws of the State of New York, are of equal validity and obligation in the State of Missouri.

The general rule is thus stated by Chancellor Kent:—

"It may be laid down as the settled doctrine of public law, that personal contracts are to have the same validity, interpretation and obligatory force in every other country which they have in the country where they were made. The admission of this principle is requisite to the safe intercourse of the commercial world, and to the due preservation of public and private confidence; and it is of very general reception among nations. Parties are presumed to contract in reference to the laws of the country in which the contract is made, and where it is to be paid, unless otherwise expressed; the maxim is, that *locus contractus regit actum*, unless the intention of the parties to the contrary be clearly shown. * * * It is a general rule, that whatever constitutes a good defense, by the law of the place where the contract is made or is to be performed, is equally good in every other place where the question may be litigated."

2 Kent's Comm. (12th ed.), pp. 458*, 459*.
citing Story's Conflict of Laws, §§ 244–259.

In Story's Conflict of Laws (8th ed.), the rule is thus stated:—

Section 242. "Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; for, as we shall presently see, in the latter case, the law of the place of performance is to govern. If valid there, it is by the general law of nations, *jure gentium*, held valid everywhere, by the tacit or implied consent of the parties.

(Citing *White* v. *Hart*, 13 Wall. 646; *Black* v. *Zacharie*, 3 Howard, 483; *Hoyt* v. *Thompson*, 19 N. Y. 207; 1 Seld. 352; *Eubanks* v. *Banks*, 34 Ga. 407; *Knowlton* v. *Erie R'y Co.*, 19 Ohio St. 260; *Flannagan* v. *Packard*, 41 Vt. 561; *Smith* v. *Godfrey*, 28 N. H. 381; *Smith* v. *McLean*, 24 Iowa, 329; *Bond* v. *Cummings*, 70 Me. 125.) The rule is founded not merely in the convenience, but in the necessities of nations; for otherwise it would be impracticable for them to carry on an extensive intercourse and commerce with each other. * * *

Section 244. "But there is an exception to the rule, as to the universal validity of contracts; which is that no nation is bound to recognize or enforce any contracts which are injurious to its own interests or to those of its own subjects. * * * This exception results from the consideration that the authority of the acts and contracts done in other States, as well as the laws by which they are regulated, are not, *proprio vigore*, of any efficacy beyond the territories of that State; and whatever effect is attributed to them elsewhere is from comity, and not of strict right. And every independent community will and ought to judge for itself, how far that comity ought to extend. The reasonable limitation is, that it shall not suffer prejudice by its comity. (Citing in note *a*, *Christian Union* v. *Yount*, 101 U. S. 352; *Cowell* v. *Springs Co.*, 100 U. S. 55.)

Section 263. "Another rule illustrative of the same general principle is, that the law of the place of contract is to govern as to the nature, the application and the interpretation of the contract: *locus contractus regit actum.*

Section 280. "The rules already considered suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity with the presumed intention of the parties that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. (Citing *Andrews* v. *Pond*, 13 Peters, 65.)

In *Scudder* v. *Union National Bank*, 91 U. S. 412–13, this court held:—

"Matters bearing upon the execution, the interpretation and the validity of a contract are to be determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suit, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought."

In the same opinion, this Court also said (91 U. S., p. 411):—

"In Wheaton on Conflict of Laws, Sect. 401*p*, the rule is thus laid down: —

"'Obligations, in respect to the mode of their solemnization, are subject to the rule, *locus regit actum;* in respect to their interpretation, to the *lex loci contractus;* in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law.' (Citing *Miller* v. *Tiffany*, 1 Wall. 310; *Andrews* v. *Pond*, 13 Pet. 78; *Lamesse* v. *Baker*, 3 Wheaton, 147; *De Wolff* v. *Johnson*, 10 Wheaton, 383: Story, Confl. Laws, 203; *Adams* v. *Robertson*, 37 Ills. 59; *Ferguson* v. *Fuffe*, 8 C. & F. 121; *Bain* v. *Whitehaven*, &c., *R'y. Co.*, 3 H. L. Cas. 1; *Scott* v. *Pilkinton*, 15 Abb. Pr. 280.)

"The rule is often laid down, that the law of the place of performance governs the contract. Mr. Parsons, in his Treatise on Notes and Bills, uses this language: 'If a note or bill be made payable in a particular place, it is to be treated as if made there, without reference to the place where it is written or signed or dated' (p. 324). For the purposes of payment and incidents of payment, this is a sound proposition."

In *Miller* v. *Tiffany*, 1 Wall. 310, this court said: —

"The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and

if the interest allowed by the law of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury. (Citing *Andrews* v. *Pond*, 13 Peters, 77, 78; *Curtis* v. *Leavitt*, 15 N. Y. 92; *Berrien* v. *Wright*, 26 Barbour, 213.) The converse of this proposition is also well settled. If the rate of interest be higher at the place of contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate. (Citing *Depeau* v. *Humphrey*, 20 Howard, 1; *Chapman* v. *Robinson*, 6 Paige, 634.)

"These rules are subject to the qualification, that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. The validity of the contract is determined by the law of the place where it is entered into. Whether void or valid there, it is so everywhere. (Citing *Andrews* v. *Pond*, 13 Peters, 78; *Mix* v. *Madison Ins. Co.*, 11 Indiana, 117; *Corcoran & Riggs* v. *Powers*, 6 Ohio St. 19.)

In *Stix* v. *Matthews*, 63 Mo. 371, 373 (affirmed, *s. c.* 75 Mo. 97), the Supreme Court of Missouri said: —

"It is well settled that a contract made in one State, and to be there executed, is to be construed according to the laws of that State (2 Parsons Contr. 586). The notes upon their face showing that they were to be paid in Indiana, and the statement of the witness that they were made in Indiana, subjects them to the operation of the above rule."

In the case at bar, the contract was both made and to be performed, by both parties, in the State of New York.

The policy sued on was completely executed at the society's office in the city of New York by its President and Secretary. It was not, nor was required to be, countersigned by any agent elsewhere, though necessarily thence transmitted to Missouri for delivery to the assured; nor does it appear that it was transmitted otherwise than by

mail. Clearly it was a complete and valid contract of the company from the time it left their office in New York.

Said contract was also to be performed in the city of New York, by all parties thereto. The assured expressly agreed to pay all premiums at the company's office in New York city. And though the company reserved the right at its pleasure to appoint suitable persons elsewhere with authority to collect premiums on producing and countersigning receipts therefor previously executed in New York by a designated officer of the company, yet the exercise by the company of that option in respect of any one or more of the premiums could not, under the express provisions of the policy, release the assured from his liability to pay any other premium in New York, unless pursuant to an express agreement in writing signed by some of the designated officers authorized thereto. But no exercise of that option, much less any such modification of the contract, is here alleged, nor is there any thing to show that all three of the premiums paid were not in fact paid at the society's office in New York.

On the other hand, the company's promise to pay the sum insured, if the conditions of the policy were fulfilled, was also by the express terms of the policy to be performed at its own office in New York. In this respect also it was agreed that no person other than a designated officer of the company was authorized to modify the contract, nor is any such modification thereof alleged.

It follows, under the general rule above stated, that this contract must be governed by the law of New York, and not by that of Missouri.

That general rule is not an arbitrary one. As the authorities above cited show, it is designed to carry out the express or presumed intention of the parties to the contract: and if we apply that test to the contract here sued on, the same conclusion follows.

In the important case of *Pritchard* v. *Norton*, 106 U. S.

124, 136–7 (affirmed, *Lamar* v. *Micou*, 114 U. S. 220), the only question was whether the contract sued on was governed, as to the rights and obligations of the parties, by the law of New York or that of Louisiana. The doctrine of the *lex loci contractus* was exhaustively discussed, both on principle and authority, and the true ground and reason of the general rule under consideration was thus stated.

"The phrase *lex loci contractus* is used, in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall, in *Wayman* v. *Southard*, 10 Wheat. 1, 48, where he defined it as a principle of universal law,—'The principle that in every forum a contract is governed by the law with a view to which it was made.' The same idea had been expressed by Lord Mansfield in *Robinson* v. *Bland*, 2 Burr. 1077, 1078. 'The law of the place,' he said, 'can never be the rule where the transaction is entered into with an *express* view to the law of another country, as the rule by which it is to be governed.' And in *Lloyd* v. *Guibert*, Law Rep. 1 Q. B. 115, 120, in the Court of Exchequer Chamber, it was said that 'It is necessary to consider by what general law the parties intended that the transaction should be governed, or rather, by what general law it is just to presume that they have submitted themselves in the matter.' *Le Breton* v. *Miles*, 8 Paige (N. Y.), 261.

"It is upon this ground that the presumption rests, that the contract is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention.

"So Phillimore says: 'It is always to be remembered that in obligations it is the will of the contracting parties,

and not the law, which fixes the place of fulfilment — whether that place be fixed by *express words* or by *tacit implication* — as the place to the jurisdiction of which the contracting parties elected to submit themselves.' 4 Int. Law 469.

"The same author concludes his discussion of the particular topic as follows: 'As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted, either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. *The parties cannot be presumed to have contemplated a law which would defeat their engagements.*' 4 Int. Law, sect. DCLIV. pp. 470, 471.

"This rule, if universally applicable, which perhaps it is not, though founded on the maxim, *ut res magis valeat, quam pereat*, would be decisive of the present controversy, as conclusive of the question of the application of the law of Louisiana, by which alone the undertaking of the obligor can be upheld.

"At all events, it is a circumstance, highly persuasive in its character, of the presumed intention of the parties, and entitled to prevail, unless controlled by more express and positive proofs of a contrary intent."

In *Pritchard* v. *Norton* the bond sued on was executed and delivered in New York; and as no other place of performance was therein designated, it was contended that it was also to be performed in New York and must therefore be governed by the laws of that state. But, under the law of New York it could not be enforced, for want of a sufficient consideration. Under the law of Louisiana, the consideration of the bond was sufficient; and since its obligation, which was to indemnify the obligee, could only be fulfilled in Louisiana, the law of that state was held to govern the contract, in accordance with the presumed intention of the parties.

In the case at bar, not only was the contract made and

to be performed in New York, but its express stipulations are conclusive that the parties intended it to be governed by the law of New York, and not by the law of any other state.

The policy provides (*supra*, p. 21) that if, after payment of premiums for three years of assurance, it should become void for default in payment of a subsequent premium, the society will issue to the beneficiary, in lieu thereof,—

"—a new paid up policy * * for the entire amount which the full reserve on this policy, *according to the present legal standard of the State of New York*, will then purchase as a single premium," — provided the policy be surrendered, &c., within six months after such default.

By the application, which was a part of the policy, (*supra*, pp. 19-20) plaintiff expressly declared that in consideration of this agreement for paid-up insurance, she did "waive and relinquish all right or claim to any other surrender value than that so provided, *whether required by a statute of any State or not*;" and that all statements and answers in said application were warranted true and offered to the society as a consideration for the contract.

It was held, however, by the learned Circuit Judge (*supra*, pp. 15–16), upon the authority of cases presently to be referred to, that under the general rule concerning the *lex loci contractus*, this contract was governed by the law of Missouri and not by the law of New York.

This ruling did not proceed upon the ground that a contract for paid-up insurance such as contained in this policy was prohibited by the Missouri statute. That proposition was separately considered (*supra*, pp. 17–18) in connection with the second question (*supra*, p. 15)—whether the stipulation in respect to forfeiture, contained in plaintiff's application, was legal and binding as a waiver of the provisions of the Missouri statute?

That portion of the opinion which relates to the general rule in question is as follows: —

"This case is submitted on a motion to strike out parts of the answer. Involved in this motion are two questions: —

"First. Is the contract sued on governed and to be construed by the laws of the State of New York or by the laws of the State of Missouri?

"Second. If subject to the laws of Missouri, is the stipulation in respect to forfeiture legal and binding as a waiver of the provisions of the Missouri statutes?

"In respect to the first question these, I think, must be taken as the accepted facts: The defendant is a New York corporation, doing business in the State of Missouri. The insured was a citizen and resident of Missouri, and made his application here, which was forwarded to New York. The application was accepted, the policy fully prepared and signed in that State, and sent to Missouri and delivered to the applicant here. By the terms of the policy all premiums are payable at the defendant's office in New York. If the sum insured should become payable the payment is to be made at its office in New York. None of the terms of the policy can be modified except by one of the four general officers of the society, and no modification is claimed.

"Under these facts I have little doubt as to the true answer to be made to this first question. In White *v.* Insurance Company, 4 Dillon, 177, it was held that the act of the legislature of the State of Missouri of March 23, 1874, in respect to policies of life insurance extends to all policies delivered in this State after the act went into effect. That was a suit against a foreign insurance company doing business in this State. In Fletcher *v.* New York Insurance Company, 13 Fed. Rep. 526, it was held that a foreign insurance company cannot withdraw itself from the operation of the statutes of a State in which it does business by the insertion of clauses in its policies. That was a case in which the defendant company insisted that by virtue of certain clauses in the application the contract was to be finally and fully executed in New York. In his opinion, an opinion concurred in by Circuit Judge McCrary, Judge Treat uses this language: 'The defendant

corporation, having been permitted to do business in Missouri under the statutes of the latter, was bound by all the provisions of those statutes, and could not by the insertion of any of the many clauses of its forms of application, etc., withdraw itself from the obligatory force of the statute. The contract of insurance, therefore, is a Missouri contract, and subject to the local law.' This case was taken to the Supreme Court of the United States, and is reported — 117 U. S. 519. The case was there decided upon a different question, but in the statement of facts, which, as it appears, was prepared by the justice writing the opinion, appears this language: 'The company is a corporation, under the laws of New York, but it also transacts business in Missouri through agents residing there, and of course, with reference to the business done in that State, is subject to its laws.' In view of these authorities and considering the reasoning of Judge Treat in the opinion above referred to, I deem it unnecessary to discuss this question further, and simply hold that the Missouri statute controls. See also Ehrman *v.* Insurance Company, 1 McCrary, 123; In re Insurance Company, 22 Fed. Rep. 109; Paul *v.* Virginia, 8 Wallace, 168."

It is respectfully submitted that, in respect of the contract here sued on, these authorities do not sustain the conclusion drawn from them.

The question decided in *White* v. *Insurance Co.*, 4 Dillon, 177, was a preliminary question, arising on demurrer to defendant's answer, which was sustained with leave to amend. But that ruling was based on a state of facts, admitted or assumed, and upon the provisions of a Missouri statute (Act of March 23, 1874), wholly different from those here presented.

No question arose in that case concerning the application of the general rule as to the *lex loci contractus*, here relied on. Both the statement of the case and the opinion assume that the policy there sued on was issued and delivered, not in New York, but in Missouri. The opinion refers (4 Dillon, 180) to the decision, at the preceding term, in *Chance*

v. *Union, &c., Ins. Co.*, holding that said Act of March 23, 1874, controlled contracts of life insurance "made by a foreign company doing business in Missouri, *and countersigned and delivered in this State* by the local agents of the company;" and after discussing the purpose of that Act, the court say (4 Dill., p. 182):—

"We are of the opinion that policies *issued and delivered in Missouri* after that act took effect fall within its protective operation; and *as to such policies* the act is to be treated as if incorporated therein, *certainly, unless there is an express provision in the policy to the contrary*, if it be competent, indeed, to insert such a provision."

Moreover, the provisions of the Act of March 23, 1874, there construed, were wholly different from the statutory provisions here in question. That Act related exclusively to the materiality and effect of *misrepresentations* made in obtaining a policy of insurance, *when set up as a defense in a suit on such policy*. It provided that no such misrepresentation should be deemed material or render the policy void —

"— unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable; and whether it so contributed in any case, shall be a question for the jury."

The policy there sued on provided (4 Dillon 178) that all statements in the application were warranted by the assured to be true, and that if obtained by any fraud or *misrepresentation*, the policy should be void. Defendant's answer alleged that certain statements in the application were false. No other defence was set up, no waiver of the statute provisions alleged, nor that the contract was made or to be performed elsewhere than in Missouri. The court sustained the demurrer, holding (4 Dillon, 182, above quoted), that *as to policies issued and delivered in Missouri*,

said act must be treated as if incorporated therein. But that conclusion was expressly based (4 Dillon, 183) upon "the general rule that laws in existence are necessarily referred to *in all contracts made under such laws*, and that no contract can change the law." This assumes, as above stated, that the policy there sued on was a contract made and to be performed in, and therefore governed by, the laws of the State of Missouri.

No such assumption can be made here. The first question here to be determined is, by what law the contract sued on is to be governed? — the fact being, as above shown, that it was neither executed nor to be performed in Missouri, but in New York. In respect of that question, it is submitted that *White* v. *Insurance Co.* is not in point, still less an authority, since it lacked the essential facts in view of which the general rule as to the *lex loci contractus* is here relied on, and upon which the decision in *Pritchard* v. *Norton* directly turned.

But in the *White* case, the court in effect conceded (4 Dillon, 182, 183), that if the policy had contained an express waiver of the statute provision in question such waiver would have been valid. The policy here sued on does contain such express waiver, which is insisted on as a separate defense; and on that point, *White* v. *Insurance Co.* is an authority for the plaintiff in error.

A like criticism applies to the decision in *Fletcher* v. *N. Y. Life Ins. Co.* (13 Fed. Rep. 526, cited by Judge Brewer), which was on demurrer to replication. That case was twice tried in the Circuit Court (11 Fed. Rep. 377; 14 id. 846) and the final judgment below reversed here for error (117 U. S. 519). At neither trial below, nor in this court, was the question of the *lex loci contractus* involved: the case turning altogether on the fraud and misrepresentations alleged, and the only Missouri statute referred to being the Act of March 23, 1874, already mentioned, re-enacted as

Sections 5976-7, Revised Statutes, 1879. It appears both from the pleadings and the proof, (as reported, 11 Fed. Rep. 378; 13 id. 526, 528; 117 U. S. 521-3) that the policy sued on was issued and delivered to the assured at St. Louis, by the local agent who received the application and conducted the negotiations there, and no waiver by the assured of any provision in the Missouri statute, was alleged. Upon these facts, it was held a Missouri contract. The contention to the contrary seems to have been based solely on the agreement in the application (13 Fed. Rep. 526) that the company's officers at New York should alone *determine whether a policy should issue*, on the faith of the statements in the application. Judge Treat's declaration that "a foreign insurance company cannot withdraw itself from the operation of the statutes of a State *in which it does business* by the insertion of clauses in its policies," is one which plaintiff in error is not concerned to question; unless, indeed, it means that a New York corporation cannot enter into a contract with a citizen of Missouri, in the latter State, even by consent of both parties, which shall be governed by the law of New York. No such doctrine as that can be reconciled with *Pritchard* v. *Norton;* and on no other view, we submit, could the decision in the *Fletcher* case be held applicable to the case at bar.

Ehrman v. *Insurance Co.*, 1 McCrary, 123, is still less in point. The defendant there pleaded in abatement of a writ which,— the company having no office or agent in the State,—was served upon the Auditor of State, pursuant to the Arkansas statute,— that it had never complied with that statute by appointing an agent and obtaining authority to do business in the State. The plea was overruled, it being held as admitting *that the contract sued on was made in Arkansas*, and that the defendant was therefore estopped to deny jurisdiction under the statute.

The decision in 22 Fed. Rep. 109, *In re Insurance Co.*, turned, in part, on the *lex loci contractus;* but there also the general rule upon which plaintiff in error here relies was applied to a wholly different state of facts. No question there arose in reference to any statute provision, or any waiver thereof as showing the intention of the parties. The contract sued on was held to have been made in Canada, and governed by Canadian law, for reasons wholly inapplicable here (22 Fed. Rep 111, 113); among others, that the policy mailed from Buffalo was wholly different from the policy applied for, and that the minds of the parties never met until it was delivered to and accepted by the insured at Sarnia, Ontario, where the premium note was dated and signed.

In *Paul* v. *Virginia* 8 Wall. 168,181, no question whatever arose as to the *lex loci contractus*, or its application to any state of facts. The single question in that case was as to the constitutionality of the Virginia statute regulating foreign insurance companies, which was sustained. But neither party to this record denies the validity of the Missouri statute; the question now under consideration being only whether, under the established general rule as to the *lex loci contractus*, the contract here sued on is to be governed by the law of Missouri or that of New York.

Plaintiff in error therefore contends, that neither of the authorities cited by the court below as bearing on the question in hand, is in point; that the rule in *Pritchard* v. *Norton* (106 U. S. 136–7; *supra*, pp. 42–3) is conclusive of that question, — namely, that the intention of the parties determines the law governing the contract; that the parties to this contract not only intended, but expressly agreed, that it should be governed by the law of New York and not by the law of Missouri; and that the Circuit Court erred in ruling that

the Missouri statute not only governed the contract, but must be treated as if incorporated therein.

Even if it were held that the Missouri statute in question prohibited the contract which these parties intended to make, it by no means follows that the provisions of that statute were or could be substituted, *proprio vigore*, for the terms in fact agreed on. That is a very different proposition, as will presently be shown; but the second question stated in the opinion of the Circuit Court (*supra*, pp. 16: 34) is next to be considered, namely:—

If the contract sued on was subject to the laws of Missouri, is the stipulation in respect to forfeiture legal and bonding as a waiver of the provisions of the Missouri statute?

II.

The Missouri statute in question does not prohibit, but only postpones for a limited period, the forfeiture of a life policy for non-payment of premiums, by treating the net value of the policy, during such period, as a fund applicable to the payment of such premium.

Such provision, being for the benefit of the assured, could lawfully be waived by her; a fortiori, by substituting therefor another provision of the same general character.

Such waiver, made in this case by express stipulation in the application and policy, was valid and binding on the assured; and the court below erred in holding the contrary.

The rulings of the District Judge, at the trial (*supra*, pp. 32-3), logically resulted from the previous ruling of the Circuit Judge, sustaining the motion to strike out parts of defendant's answer (*supra*, pp. 14-16). It was not denied that the policy, in express terms, waived the benefit of the

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Missouri statute as alleged; but that motion was made, and sustained, upon the ground —

"That said alleged waiver is void, because contrary to public policy, and to the policy, and laws of this State, and is forbidden and declared null by the statutes of this State, to all of which the said policy was subject."

The statute provisions (2 Rev. Stat. Mo. 1878, Secs. 5983 and 5985) relied on in said motion, and in the opinion sustaining the same (*supra*, pp. 17–18), are as follows:—

"SEC. 5983. *Policies non-forfeitable, when.*— No policy of insurance on life hereafter issued by any life insurance company, authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums be forfeited or become void, by reason of the non-payment of premium thereon, but it shall be subject to the following rules of commutation, to wit: The net value of the policy when the premium becomes due and is not paid, shall be computed upon the American experience table of mortality, with four and one-half per cent. interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium and the assumption of mortality and interest aforesaid:" * * *

"SEC. 5985. *Rule of payment on commuted policy.*— If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section five thousand nine hundred and eighty-three, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy the same as if there had been no default in the payment of premium, any thing in the policy to the contrary notwith-

standing; provided, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured;" * * *

In reference to these provisions, it is to be observed that —

1. No penalty is provided for their enforcement, nor is the forfeiture of a life policy for non-payment of premiums declared unlawful.

2. Their whole effect, when applicable, is simply to add to the contract set forth in the policy a further statutory covenant or condition, by which, in case of default in payment of a premium *after two full annual premiums have been paid*, the policy shall be continued in force *for a limited period*, by treating its net value as a fund applicable in part to the payment of the premium in default.

3. Parties to such contracts are not prohibited from adding to or modifying this statutory provision or covenant by express stipulation. It is not declared that provisions against or postponing forfeiture shall be void unless they conform to the statute.

4. There is nothing in the statute which prohibits the assured in a life policy from waiving this statutory provision for his benefit; *a fortiori*, by accepting in lieu thereof, by express stipulation (as in this case), a different provision of the same general character.

In construing these sections (5983 and 5985) of the statute, it is important to note that they nowhere provide that a clause in a life policy, declaring it forfeited for non-payment of premium, shall be unlawful or void.

Section 5983 provides only that, after payment of two full annual premiums, and not before, such forfeiture shall not take effect until the assured has been credited, towards the payment of the premium in default, with three-fourths of the "net value" of the policy created by the premium already paid.

In other words, the manifest intent of these two sections is, not to make unlawful or void an agreement forfeiting a life policy for non-payment of premiums, but simply to postpone the operation of such an agreement, on equitable principles, for a limited period, provided certain conditions are first fulfilled. In case of default on either the first or second annual premium payable under a policy, the forfeiture clause is left in full force; and if the assured survive the period during which the "temporary insurance" lasts, the privilege expires and the forfeiture is complete.

This is something very different from declaring forfeiture clauses unlawful or void or contrary to public policy. On the contrary, this statute recognizes and sanctions the justice of such provisions, until the assured has paid to the company an amount which the legislature, according to established rules of life insurance, deems sufficient to create for the policy what is called a "net value;" that is, a value in excess of the necessary provision for the company's expenses. The aggregate of such values constitutes the fund out of which the company must pay its losses. A legislative requirement that whenever the premiums paid on a given policy are sufficient, so far as that policy is concerned, to contribute to this fund, the assured shall participate in its benefits, is very far from a legislative declaration that a "forfeiture clause" in general is something which the law reprobates or denounces. If that were its purpose, the statute would be very different. It would expressly provide that any such clause shall be void. It would absolutely forbid any such requirement by the company or agreement by the assured, and would unquestionably enforce such prohibition by some penalty.

Strong confirmation of this view of Sections 5983 and 5985 is found in the provisions of Section 5986, immediately following, which does not appear to have been con-

sidered at all by the court below. The text of that section is below given in full. It suffices here to say that its alternative provisions are wholly inconsistent with a construction of Sections 5983 and 5985 by which any mode of commutation other than that provided for in Section 5983, or any agreement therefor contained in the policy, should be held unlawful and void.

Even if the statute prohibited such agreements and annexed a penalty thereto, it would not follow that the courts would not enforce them. This court long ago held, that—

"Where a statute prohibits an act or annexes a penalty to its commision, it is true that the act is made unlawful, but it does not follow that the unlawfulness of the act was intended by the legislature to avoid a contract made in contravention of it."

Harris v. *Runnels*, 12 Howard, 79, 84;
affirmed in
Gold Mining Co., v. *National Bank*, 96 U. S. 641;
National Bank v. *Matthews*, 98 U. S. 627.

But the fact that this statute contains no such prohibition or penalty, nowhere declares unlawful or void a "forfeiture clause" as such, but on the contrary sanctions such provisions until after two annual premiums have been paid, is conclusive that the legislature intended by no means to declare "forfeiture clauses" contrary to public policy, or to prohibit their enforcement, but simply *that they shall not be enforced in an inequitable manner;* that whenever and as soon as the "reserve," intended for the ultimate payment of losses, has begun to be created, the assured in each policy shall receive his proportionate share of its benefits.

But this is not all. Even under these two sections the the assured may lose all benefit of the premiums paid by

him, and a forfeiture clause in a life policy may still, under their express provisions, be enofrced.

Suppose that after the payment of two annual premiums, the assured has failed to pay any subsequent premium; that three-fourths of the net value of his policy, computed as provided bythis statute, less existing indebtedness thereon, would suffice for a single premium for "temporary insurance" in the amount written in the policy for six months longer; that the assured is living after such six months have expired; and assume that the rights and obligations of the parties are to be determined in accordance with this statute. Would the "forfeiture clause," in such case, have no effect? Does the statute, in such case, either expressly or by implication, declare or provide that the assured shall not be bound by, nor the company receive any benefit from, that stipulation for forfeiture? By no means. In such case, the effect of the statute would be this, — that after such period of "temporary insurance" had expired, the "forfeiture clause" would have its full effect, and the insured would be deprived of any further benefit from the policy.

It is thus clear that the provisions of sections 5983 and 5985, taken together, really prescribe,

1. That a "forfeiture clause" in a life policy *shall be valid* and enforceable according to its terms, until at least two full annual premiums thereon have been paid.

2. That after two full annual premiums have been paid, the non-payment of a subsequent premium *shall not at once and absolutely forfeit the policy*, even though therein so provided, but the policy shall be "commuted."

3. That for this purpose, the "net value" of the policy shall be computed on the basis prescribed in the statute; and after deducting from three-fourths of such net value all existing indebtedness on the policy,

"the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy."

4. That if the assured die within the period of such temporary insurance, thus paid for out of the net value of the policy, and no other condition has been violated than the payment of premium when due, the company shall be liable for a loss on the policy to the amount insured. But, if the assured shall live beyond such period, *then the forfeiture clause of the policy shall take effect*, and the company shall no longer be liable thereon.

This, we repeat, is something very different from a legislative declaration that a "forfeiture clause" in a life policy is unlawful and void, and shall not be enforced by the courts. It is founded upon a completely different theory, namely, that after premiums to a certain amount have been paid, a "reserve" has begun to accumulate in the hands of the company, in excess of the proportional cost of the policy, the benefits of which the assured should, on equitable principles, be permitted to share; but that after this equitable allowance is made to him, there is no reason why the forfeiture agreed on should not be enforced.

But if this is the true intent and meaning of those sections, if the real purpose of the legislature was simply *to secure to the assured what they considered his equitable share of the "reserve," as soon as it began to exist*, then it is obvious that the particular method of commutation provided for in Section 5983 is merely one means of reaching that end, authorized by the act, and prescribed by it in the absence of any other, —*but which by no means implies that any other method which the parties may prefer and agree on would be unlawful, or should not be enforced by the courts.*

This conclusion, we repeat, finds strong support in the provisions of Section 5986, presently to be given.

It is submitted that this is the true intent and meaning

of these sections. No construction of the statute, not in harmony with this view, would carry out the purpose plainly indicated by its provisions when taken as a whole.

No other construction would be in accordance with the rule declared by this court in *Harris* v. *Runnels*, above cited (12 Howard, 85), and since repeatedly affirmed. In that case was construed a statute of Mississippi, expressly prohibiting, under severe penalties, the bringing of slaves into the State, unless accompanied by prescribed certificates, intended to keep out convict negroes. To a suit on a note given for slaves brought into the State without such certificate, the defense was made that the consideration was illegal: *held*, that the contract was not unlawful or void, and the note must be paid. After discussing at length the rule by which such statutes should be interpreted, this court said (12 Howard, 84): —

"It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it."

The differences in the form and phraseology of such statutes are then pointed out, and the conclusion reached, (p. 85) that —

"It must be obvious, from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined before courts should refuse to give aid to enforce contracts which are said to be in contravention of them."

The same doctrine is established in Missouri. In *Hemery* v. *Marksberry*, 57 Mo. 399, 404, the defense of usury was set up in an action upon a note. The statute (Wagner's Rev. Stat. Mo. 1870, p. 783, Ch. 77, §§ 4, 5) provided expressly that no person or persons should take, directly or

indirectly, for the use or loan of money more than the rate therein specified; also prescribing, as a penalty for its violation, the forfeiture to the common school fund of the interest on the amount actually lent; *held*, that the note sued on was not void, and judgment properly rendered for plaintiff for the principal debt, and for the school fund for interest thereon.

In *Farmers'*, *&c.*, *Bank* v. *Harrison*, 57 Mo. 503, 509, the defense of illegality was made to a suit, by a corporation, upon a promissory note for money loaned at usurious interest. It was contended that even though such a contract were not void between natural persons, yet the courts should not enforce it on behalf of a corporation whose power to make contracts was found in its charter, which limited the rate of interest for which it might agree. But the contract was held valid, except as to the usurious interest, on the ground that "the measure of illegality or immorality is the extent of the prohibition:" in other words, that the courts should not hold a contract illegal, even though inconsistent with the statute, except so far as the statute expressly requires them to do so.

But it may be said, that even conceding that a "forfeiture clause" in a life policy is not absolutely prohibited or made void by the statute in question, yet by prescribing a specific mode of commutation in case of default in payment of premiums, section 5983 does impliedly prohibit the adoption of any other mode, and does thereby make unlawful and void the agreement for commutation contained in this policy.

This contention presents the real question arising on this branch of the case, and which the court below decided adversely to the plaintiff in error, namely, —

Whether, under the Missouri statute in question, the courts should declare unlawful and void a stipulation in a life insurance policy, by which the assured, as part of the

consideration for the contract, expressly waived and relinquished the statutory provision for commutation in case of default on premiums, and agreed to substitute therefor a different mode of commutation, also for his benefit, but upon different conditions from those prescribed by the statute?

Obviously, the answer to this question depends upon the true intent and general purpose of the statute, taken as a whole, and interpreted in accordance with the principles above mentioned.

It is contended for plaintiff in error that there is nothing whatever, either in the statute, or in the well settled rules concerning the waiver of statutory rights or privileges, because of which the courts should refuse to enforce such an agreement: this, upon the grounds and authorities following:—

1. There is not a word in either section 5983 or 5985, forbidding or declaring void an agreement or waiver of this kind. In fact, there is nothing in them on that subject. They confer upon the assured a certain privilege, based upon the fact that he has paid two annual premiums on his policy, and has thereby begun to create a fund, the benefit of which he ought, on equitable principles, to share, even though he make default in payment of premium. But there they stop. Whether the assured will avail of and insist upon that privilege, or whether he will prefer to substitute something different in lieu thereof, these sections do not inquire or anticipate at all. They do modify, or provide for modifying, upon the conditions and to the extent and for the reasons above mentioned, the strict requirements of the forfeiture clause. But they do nothing more. Nothing is clearer than that *neither of these two sections* (5983 and 5985) contains any reference whatever to any such question as, whether the assured may or may not choose to waive the privilege or benefit thus provided for him.

2. Still less does either of these sections, even by reasonable implication, prohibit the assured from waiving such privileges, or declare unlawful or void an agreement to that effect.

Taken in connection with Section 5986 (below copied in full), a contrary implication, we submit, is clear. But deferring, for the moment, the consideration of that section, the general doctrine is settled, both in this court and in the courts of Missouri, that a right or privilege conferred by statute, or even secured by the constitution, may be waived by the party for whose benefit it is intended. Numerous constitutional and statutory provisions — based, of course, upon considerations of public policy — confer upon or secure to the citizen, under given circumstances, many important privileges and rights. One familiar example of this is found in statutes of limitation, which enable a defendant to plead the mere lapse of time in bar of demands otherwise undisputed.

The Missouri statute of limitations (2 Rev. Stat. Mo. 1889, p. 1586, Chap. 103, Secs. 6764 *et seq.*) not only permits such a defense, but prohibits the bringing of suits after the periods therein limited. In respect of personal actions, it declares (§ 6773) that "civil actions, other than those for the recovery of real property, *can only be commenced* within the periods prescribed," etc. In respect of real actions (§ 6764) it declares that "*no action for the recovery of any lands, tenements or hereditments, or for the recovery of the possession thereof shall be commenced, had or maintained* by any person," etc., unless it appear that the plaintiff, his ancestor, etc., was seized or possessed of the premises in question within ten years before the commencement of such action. Under this statute, it is settled law in Missouri that adverse possession for the statutory period, duly pleaded and proved, not only bars a recovery by the former owner, but extinguishes his title and

confers it upon the adverse possessor (*Ridgeway* v. *Holliday*, 59 Mo. 444).

Still more familiar and important are constitutional guaranties, as of the right of trial by jury, the right of every person accused of crime to meet the witnesses against him face to face, and other provisions securing the fundamental rights of the citizen. There is no comparison between rights like these and the limited and temporary privilege provided by the Missouri insurance law for the benefit of an assured who has failed to strictly fulfil his contract; a privilege which, as above shown, by no means implies legislative reprobation of the "forfeiture clause," but only that its application shall be postponed and limited in accordance with the principles of equity.

And yet no principle is better established, notably in the courts of Missouri, than that such provisions may be waived; of which the following cases furnish examples: —

In *Shutte* v. *Thompson*, 15 Wallace, 159, this court expressly said: —

"A party may waive any provision, whether of contract or of a statute, intended for his benefit."

In that case, the defendant objected to the reading of a deposition, because of failure to observe several material regulations of the act of Congress under which it was taken. It appeared, however, that his counsel had accepted notice of taking it, and appeared and cross-examined the witness, without objection either to the sufficiency of the oath, to the reasons for the taking of the deposition or to the competency of the magistrate. Under these circumstances, this Court held that his consent to its taking must be presumed, or a fraudulent attempt to mislead the plaintiff must be conceded; and that in either view, he ought not to be permitted to insist on the provisions of the statute; adding: —

"If he may, he is allowed to avail himself of what is substantially a fraud. Parties to suits at law may assert their rights to the fullest extent; but neither a plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a court whose province it is to administer justice will take care, on the trial of any cause, that neither party shall reap any advantage from his own fraud."

Does not the rule thus tersely stated in respect of judicial proceedings apply with equal force to a statutory privilege, the benefit of which the party making a contract deliberately waived and relinquished, well knowing that the contract would not have been made with him if he had not consented to such waiver?

The courts of no state have more often or explicitly affirmed the right of a party to waive a constitutional or statutory privilege enacted for his benefit than those of Missouri.

In *State* v. *Robertson*, 71 Mo. 448, the Supreme Court affirmed a conviction for burglary, although the panel from which the trial jury was selected was less than that prescribed by law; holding that the defendant's failure to make objection when the jury were summoned was a waiver of his right, and saying: —

"Our reports abound with cases in which it has been held that a mere statutory privilege or right may be waived by the defendant."

In *State* v. *Waters*, 62 Mo. 196 (affirmed, in 1888, in *State* v. *Gilmore*, 95 Mo. 559), that court refused to reverse a conviction for murder, it being assigned for error that the statutory panel of jurors was not full; holding that as the trial progressed without objection on the part of defendant and it was not shown that injury had otherwise accrued to him therefrom, he had waived his statutory right.

In *State* v. *Wagner*, 78 Mo. 644, the defendant, convicted of murder in the second degree, assigned for error that a written statement presented by the prosecuting attorney, on applying for a continuance, as containing the testimony of absent witnesses, was read to the jury as and for their testimony; admitting that this was done by his (defendant's) consent, but claiming that his constitutional right to meet the witnesses against him face to face could not be waived. But the judgment was affirmed, both on principle and authority, citing a like decision by the Supreme Court of Iowa in *State* v. *Polson*, 29 Iowa, 133.

In *Dodd* v. *Thomas*, 69 Mo. 364, 370, the appellant challenged, on constitutional grounds, the validity of an act by which a statutory bond was substituted for the liability of an officer making a wrongful seizure. But the Supreme Court sustained the act, saying:—

"Every one who owns property in this country, has a constitutional guaranty of his right thereto, but that right may be waived and relinquished by many acts other than a conveyance of the title by the owner. Familiar instances will readily suggest themselves."

In *Merrill* v. *St. Louis*, 83 Mo. 252, the same court held that the constitutional right to trial by jury could be waived, affirming *State* v. *Wagner* and *Dodd* v. *Thomas*, above cited, and adding:—

"The inviolability of contracts and private property are secured to the citizen by the organic law; but in the every-day proceedings of the courts it is held that parties to contracts and claimants to property have waived their right to insist upon either."

The above cases show that a statutory right or privilege may be effectually waived, not merely by express agreement, but by the mere failure of a party to insist upon it

at the proper time. Accordingly, although the Missouri statute of limitations in terms forbids the bringing of civil actions except within the times respectively therein limited, the general rule in that State is that when a party relies upon the statute of limitations, he must plead it, otherwise it is presumed that he waives it.

Stiles v. *Smith*, 55 Mo. 366;
Orr v. *Rode*, 101 Mo. 398.

The same general principle is affirmed in other States.

State v. *Warden*, 46 Conn. 349;
Dillingham v. *State*, 5 Ohio St. 280;
Baker v. *Braman*, 6 Hill (N Y.) 47;
Lee v. *Tillotson*, 24 Wend. 338.

In *Ripley* v. *Ætna Insurance Co.*, 30 N. Y. 136, a provision in a policy of insurance that no action should be maintainable thereon unless brought within one year after the loss was held valid, though repugnant to the State statute of limitations: citing (p. 151) decisions to like effect in Ohio, Georgia, Pennsylvania, Rhode Island, Massachusetts, Maine and Tennessee, and by Mr. Justice Nelson in *Cray* v. *Hartford Ins. Co.*, 1 Blatchf. 280.

There are cases, no doubt, in which the courts have refused, on grounds of public policy, to enforce contracts by which a statutory privilege was waived — or rather, by which the party claiming the benefit of the waiver was attempting to avoid or escape some positive duty or liability imposed by statute, usually in the exercise of the police power. Of these, the case of *Railroad Co.* v. *Peavy*, 29 Kansas, 169, cited by the court below (*supra*, p. 19) — the only case cited by it on this point — is an example. There, a railroad company was sued for damages by an employe, for injuries resulting from the negligence of a fellow serv-

ant. One defense was, that the plaintiff, by his written contract of employment, had expressly agreed, in advance, to release the company from all liability for injuries sustained by him in consequence of any defect in machinery, etc., or any negligence of other employes, himself expressly assuming all risks of the sufficiency of the former and the skill and proper selection by the company of the latter. This was plainly an attempt to evade a general statute of Kansas, in force when this contract was made, which provided that all railroad companies should be liable to their employes for damages resulting from the negligence of co-employes. It was held that the company could not by contract relieve itself from the duty and liability thus expressly imposed by statute.

But the purpose of the Kansas statute, and therefore the rule of its construction, was wholly different from that of the Missouri statute in question. The former was in the nature of a general police regulation, prescribing the duty and liability of common carriers to their employes. Such a regulation, designed to protect human life and limb against negligence, the courts might well hold could not lawfully be repealed by private contract.

But the Missouri statute is in no sense a police regulation. It creates no duty, imposes no new liability upon insurance companies. It is not invoked, nor is to be interpreted, in this case, on any such theory, — but exclusively on the assumption, that the contract sued on was made to be performed in Missouri, and therefore, under the rule in *Pritchard* v. *Norton*, that the parties thereto *intended to incorporate the terms of the Missouri statute into their contract.* Its sole purpose, as already shown, is to relieve the assured against the forfeiture of such contracts, except upon equitable conditions. Such a right or privilege corresponds to those secured to debtors by statutes exempting homesteads and other specified property from execu-

tion. But contracts expressly waiving such privileges as these have been repeatedly held valid by the courts.

Bowman v. *Smiley*, 31 Penna St. 225;
O'Nail v. *Crang*, 56 id. 161;
State v. *Melogue*, 9 Ind. 196;
Eltzworth v. *Webster*, 15 id. 21.

3. But the contention, that sections 5983 and 5985 of the Missouri statute neither purport nor were intended to make unlawful or void an agreement for "commuting" a life insurance policy, different from the method set forth in the statute, is conclusively supported, we submit, by the provisions of section 5986, next following them: the text of which is as follows (2 Rev. Stat. Mo. 1879, p. 1171):

"Sec. 5986. *The foregoing provisions not applicable, when.* — The three preceding sections shall not be applicable in the following cases, to-wit:—

If the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore;

Or for the unconditional commutation of the policy to nonforfeitable paid up insurance for which the net value shall be equal to that provided for in section five thousand nine hundred and eighty-four;

Or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy;

Or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof,

Then, and in any of the foregoing cases, this act shall not be applicable."

So far then, from insisting upon the particular method of commutation set forth in Section 5983, the statute expressly recognizes either one of four other methods as

equally efficient for its real purpose of securing to the assured an equitable share in the "net value" of the policy: and by the fourth of these clauses declares, in effect, if not in express terms, that the assured may waive the provisions of the statute by substituting any other mode of settlement which he may prefer.

Suppose that the answer of the defendant (plaintiff in error) had set up the following defense, and that the facts averred were admitted to be true:—

> That after payment of two annual premiums on the policy here sued on, default was made on the premium next thereafter due, pending which default Samuel E. Wall died:
>
> That thereupon the society (defendant below) offered to issue to the beneficiary therein (plaintiff below) a new paid-up policy, without participation in profits, for the entire amount which the full reserve on the original policy, according to the legal standard of the State of New York at the date thereof, would then purchase as a single premium calculated by the regular table for single-premium policies then published and in use by the society: provided and in consideration that said Alice L. Wall should surrender the original policy (sued on) and release all claims thereunder:
>
> That said beneficiary accepted said offer, and agreed in writing to surrender to the society said original policy, in exchange, and as an adequate consideration, for such new paid-up policy:
>
> That thereupon the society (defendant below) tendered her a new paid-up policy such as agreed for:
>
> But that the beneficiary then refused to accept such new paid-up policy and demanded payment in full of the amount written in the original policy, claiming the same under the provisions of Sections 5983 and 5985 of the Missouri statute.

Would not such a defense have been complete, so far as any right claimed by the beneficiary under sections 5983 and 5985 was concerned? Would not such an agreement

be treated and enforced by the courts as equivalent to a surrender of the original policy under the fourth clause of section 5986, and a bar to recovery under either of the three preceding sections? Surely it is unnecessary to argue that proposition.

But the only difference between such a defense and the defense actually made in this suit is — that in the case supposed, the agreement to waive the benefit of sections 5983 and 5985 of the statute would have been made after the policy was issued and the death occurred, and would be so pleaded: whereas the agreement to accept a new paid-up policy, such as above described, and to surrender the original policy (here sued on) in consideration thereof, was in fact made in the application for the original policy, *which was issued in consideration of that agreement and upon the faith thereof.*

Can it be reasonably contended, that although section 5986 clearly authorizes an agreement by the beneficiary to accept paid-up insurance other than that provided for in Section 5983, and in lieu thereof, provided such agreement be made after the death of the insured, it nevertheless prohibits and makes void an agreement otherwise identical in its effect, if made by the beneficiary at the time of the original contract of insurance and as part of the consideration thereof? Clearly no such distinction was contemplated by the statute, or can be maintained. But if so, the agreement and waiver relied on by the plaintiff in error were within the provisions of Section 5986, the plan of commutation set forth in Section 5983 was thereby made inapplicable by the statute itself, and the decision of the Circuit Court that said agreement and waiver were unlawful and void was error, for which the judgment below should be reversed.

But the Circuit Court appears to have altogether ignored

the provisions of Section 5986. The opinion (*supra*, pp. 18–19), after copying the pertinent portions of Sections 5983 and 5985, states as follows the grounds upon which the defense of waiver was overruled: —

"Now, in the policy sued on there is a non-forfeiture clause, but containing a different provision, and it is alleged that in the application the insured waived and relinquished all right or claim to any other surrender value than that provided in the policy, whether required by the statute of the State or not. This is the doubtful question. It is strenuously insisted by the defendant that the statute of Missouri neither forbids nor declares null nor makes anywise illegal such a waiver as the one in question; that it merely gives a right of privilege to the insured, which, like any other personal right or privilege, he may, for sufficient consideration, waive, and that such a waiver, not being forbidden by the statute, is not contrary to public policy in any such sense as that the court should refuse to enforce it. Back of this argument and strongly supporting it is that liberty of contract which courts are so strenuous to uphold. While I am constrained to hold adversely to the defendant, it is with grave doubts as to the correctness of my conclusion.

In the first place, a technical argument can be made on the language of the statute. It says that the value of the policy shall be determined in a certain way, and then that if the death of the insured occur during the term of temporary insurance covered by the value of the policy thus determined the company shall be bound to pay the amount of the policy, 'any thing in the policy to the contrary notwithstanding.' This language is broad enough to include a waiver, and may be construed as meaning that no stipulation, no waiver, no agreement for a different forfeiture— in fact, nothing that a party can put into a policy — shall defeat the right to recover the full amount if death occurs during this time of temporary insurance. Of course, this is a purely technical construction of the statute, and I am disposed to rest my conclusion more upon the matter of public policy; and here the history of insurance must be taken into consideration.

It is notorious that many insurance companies were rigorous in insisting upon forfeiture, sometimes under very inequitable circumstances and there was no little public clamor by reason thereof. Such clamor prompted many legislatures to interfere and seek by legislation to protect what they supposed the rights of the insured. Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule, applicable to all cases — absolute and universal — because if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing.

So, although no words of penalty are attached, no express denial of the right to waive — in fact, no words of negation in any direction — yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce. R. R. Co. *v.* Peavy, 29 Kan. 169. The legislature has, by this language, declared a rule in respect to forfeitures in life insurance policies. It has thus established the policy which it believes should obtain in this State, and though sitting on the Federal bench, it is my duty to administer the laws of this State in the spirit in which they were enacted, and to uphold both their letter and their spirit. It is voluntary with any foreign insurance company whether it shall come into this State to transact business. Coming in, it should be willing to comply with all the statutes as to all business arising within this State, and no court, least of all a Federal court, should hasten to release it from this obligation. From these views and with this feeling I am constrained, though with grave doubts, to sustain the motion to strike out."

It is respectfully submitted that the reasons thus given are all met by the foregoing argument: but as to one or two points a more specific comment may be permitted.

As to the words in Section 5985 — "any thing in the policy to the contrary notwithstanding" — the opinion concedes that a construction founded upon them would be

a purely technical one. Without reference to the provisions of section 5986, it is clear that those words are merely formal and add nothing to the force or effect of the affirmative provisions of section 5983. If, as we contend, the assured had the right, under the general rule above stated, to waive the statutory privilege set forth in section 5983, as a privilege intended for his personal benefit and not a duty imposed on the company for the benefit of the public at large, then nothing short of express words would make such waiver illegal: since "the measure of the illegality or immorality is the extent of the prohibition" (*Farmers'*, *&c.*, *Bank* v. *Harrison*, 57 Mo. 509).

But if sections 5983 and 5985 are to be taken in connection with section 5986, which expressly provides that under certain further conditions they shall not be applicable to any insurance policy, then it is clear that the words above referred to must stand or fall with the remaining provisions in those sections, and the conclusion above reached cannot, we submit, be avoided.

As to the supposed "public policy" of the State of Missouri in reference to contracts of insurance, it is equally clear that Section 5986 must be taken into account in considering the three preceding sections, which, under certain conditions, it practically repeals.

Even without reference to that section, it may well be questioned, on the grounds already stated at length, whether by Sections 5983 and 5985 the legislature intended to impose upon either party to a voluntary private contract of insurance any positive duty in respect of the adjustment of claims thereunder. As already pointed out (*supra*, p. 65), there is a wide difference in that regard between a statute in the nature of a police regulation imposing a positive duty or liability for the protection of the public, and one whose object is simply to prevent the enforcement of private voluntary contracts in an

inequitable manner. If the parties to such contracts, by agreement between themselves, not otherwise unlawful, can and do attain the same end in some mode other than that provided by the statute, why should the courts deny them that right, on supposed grounds of public policy, while admitting (as the court below admits) that the statute thus rigidly construed "contains no words of penalty, no express denial of the right to waive, in fact, no words of negation in any direction?" Surely the evil and danger of such interference with the right of private contract, unless imperatively demanded by the public welfare, is more to be apprehended than any supposed injury to the public. As to the extent to which supposed considerations of public policy furnish a safe guide for the interpretation of statutes, this court long ago said: —

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the courts in the interpretation of statutes."

Hadden v. *The Collector*, 5 Wallace, 111.

But the conclusive answer to such considerations, so far as the present case is concerned, is found in the provisions of Section 5986. Four distinct conditions are therein stated, upon either of which the three preceding sections are declared inapplicable to any contract of insurance and practically repealed. It will be conceded that Sections 5983 and 5985 must be construed in connection with Section 5986. Taking them together, it is respectfully insisisted that no statute which, after authorizing the claim of a beneficiary under a life policy to be "commuted" either in the mode

specified in Section 5983, or in any one of the three modes first specified in Section 5986, still further provides for its commutation by the beneficiary *in any other mode acceptable to him* — no statute, we say, containing alternative provisions like these, can be held to establish a public policy which forbids the enforcement, as against this beneficiary, of a method of commutation not alleged to be inequitable or inadequate, which was agreed to by her in advance, and upon the faith of which agreement the policy was issued.

III.

If the waiver contained in the application and policy sued on was unlawful and void under the Missouri statute, then the plaintiff below was not entitled to recover any thing in this action, and the Circuit Court erred in refusing so to declare, because —

1. Said plaintiff, having applied for and accepted the policy on the faith of said agreement, is estopped from claiming any thing inconsistent therewith:

2. The Missouri statute in question cannot be construed as making a contract for the parties, other than that agreed upon between them, even if it be held to make void the agreement which they attempted to make.

Among other averments in the defendant's answer which were struck out on motion of plaintiff below (*supra*, p. 15), was the following: —

"And defendant avers that even if said policy of insurance and this defendant's contract therein or obligation thereunder had otherwise been within the purview of or subject to be modified or affected by any provision of any law of the State of Missouri touching policies of insurance on life (which defendant denies), yet by reason of the

premises the plaintiff is estopped from claiming the benefit of any provision of any law of the State of Missouri, if any such law there be, for any other or different surrender value or upon any other or different conditions from those in said policy stipulated for as above set forth, and further avers that said policy of insurance has never been surrendered or offered to be surrendered to this defendant."

The second instruction asked by defendant at the trial, and refused by the court, was as follows (supra, p. 28):—

"2. Defendant prays the court in the above entitled cause to declare the law to be that on the pleadings and evidence the plaintiff is not entitled to recover any thing upon the second count in the petition herein."

These rulings are assigned for error (*supra*, pp. 32–3) for the following further reasons.

1. The policy sued on (*supra*, p. 21) purports to be issued in consideration of the application therefor made and signed by Samuel E. Wall and his wife Alice (plaintiff below), and of each of the statements made therein. In and by said application they expressly agreed that all statements and answers therein were warranted to be true and offered to the society as a consideration of the contract. Among said statements (*supra*, pp. 20–21) was an express agreement by them that the person for whose benefit the assurance was effected, to–wit, said Alice L. Wall, did —

"—— in consideration of the agreements contained in the policy hereby applied for (providing for paid-up insurance in the event of the surrender of the policy at certain periods and under certain conditions specified), waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not."

Upon the faith of this agreement, among others, the policy was obtained, and it is not open to the plaintiff to deny that if this assurance had not been given, the application would have been refused.

Under such circumstances, the plainest principles of justice require that the plaintiff be not permitted to repudiate that assurance and thereby "to avail herself of what is substantially a fraud."

Shutte v. *Thompson*, 15 Wallace, 159.

In the case of *N. Y. Life Ins. Co.* v. *Fletcher*, 117 U. S. 519, 534, (referred to in the opinion in this case *supra*, pp. 17, 46), this court reversed the judgment below for error in an instruction which is thus commented on:

"A curious result is the outcome of the instruction. If the agents committed no fraud, the plaintiff cannot recover, for the answers reported are not true; but if they did commit the imputed fraud, he may recover, although upon the answers actually given, if truly reported, no policy would have issued. Such anomalous conclusions cannot be maintained.

It is respectfully submitted that the ruling of the Circuit Court in this case involves the equally anomalous conclusion that it is the duty of the courts to enforce a contract the consideration of which has failed, against a party who was induced to enter into that contract on the faith of an assurance that such consideration was valid, because the party giving that assurance chooses to repudiate it as unlawful.

2. Conceding, for the sake of argument only, that by force of the Missouri statute the agreement and waiver in question was void, it does not follow that the method of commutation set forth in section 5983 ever became a part of the contract, or should be enforced by the courts as such. The decision in *Pritchard* v. *Norton*, 106 U. S. 136-7 (*supra*, pp. 42–3), establishes the proposition that the rule which makes the law of the place of contract a part of the contract itself is founded wholly upon the presumed intention of the parties. Where the contract itself shows the contrary, no such presumption

can be made. In this case, a contrary intention is explicitly declared. The agreement of both parties, that the provisions of the Missouri statute were not and should not be incorporated in the contract, is not only set forth in express terms, but is declared to be part of the consideration of the contract itself. To hold, nevertheless, that the provisions of that statute were incorporated into the contract, that the defendant company was and is bound by them, and that the plaintiff below, after expressly waiving and relinquishing all claim whatever under them, is nevertheless entitled in a court of justice to insist upon their being carried out *as part of the contract made by the company*, would be simply to hold that it is competent for the Legislature of Missouri not only to prohibit the making of contracts by it deemed injurious to the public welfare, but to go further and make contracts for and between private parties, to which not only no mutual assent is given, but in respect of which a mutual dissent is expressly declared.

It is respectfully submitted that nothing short of this is the logical result of the decision in this cause, and that no such proposition of law can be maintained.

It is therefore respectfully insisted for the plaintiff in error that the judgment of the Circuit Court was erroneous and should be reversed.

HENRY HITCHCOCK,
G. A. FINKELNBURG,
Of Counsel for Plaintiff in Error.

Geo. P. Madill

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In the Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 340.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

vs. *Plaintiff in Error.*

ALICE LEONORA CLEMENTS' ADMINISTRATOR *et al.*,

BRIEF FOR DEFENDANTS IN ERROR.

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L. C. KRAUTHOFF,
Of Counsel.

BERKOWITZ & CO., K. C., MO.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Plaintiff in Error.
vs.
BENJAMIN F. PETTUS, ADMINISTRATOR OF THE ESTATE OF ALICE LEONORA CLEMENTS, DECEASED, *et al.*,
Defendants in Error.
No. 340.

STATEMENT OF THE CASE AND BRIEF FOR DEFENDANT IN ERROR.

This is an action on a policy of life insurance issued by the plaintiff in error, defendant below, on the life of Samuel E. Wall, who died January 21, 1884. The beneficiary named in the policy was Alice L. Wall, wife of the assured. She married Henry Q. Clements, pending the suit, and he was thereupon made a co-plaintiff, (Record p. 31.) Since the writ of error to this court was sued out she has deceased, and the action has been duly revived in the name of the administrator of her estate.

The case was tried on the second count of the petition, (Rec., 18, 19), the other counts having been dismissed. (Rec. 31.) From the pleadings and evidence, the following undisputed facts appear:

1. The defendant is a New York corporation, and at all times mentioned was engaged in the business of life insurance in the State of Missouri by authority of her laws, and maintained an agent and office in that State. (Rec., 18, 22, 38, 39.)

2. On December 15, 1880, Samuel E. Wall, a resident of Windsor, Henry County, Missouri, applied to the defendant for a policy of insurance on his life, one of the usual printed blanks of the defendant company being used for the purpose. This application was signed and dated at Windsor, Missouri. (Rec., 35.)

3. On December 23, 1880, a policy of insurance of Wall's life was signed by the defendant's officers at New York City and forwarded to Missouri, in which State it was delivered to and accepted by the assured, who continued to reside at Windsor until his death. (Rec., 18, 23.) This policy desdescribed Wall as "of Windsor, in the County of Henry, State of Missouri." (Rec., 12.)

4. Wall paid the premiums due in 1880, 1881 and 1882. These the petition alleged to have been paid in Missouri, (Rec., 18), and the allegation was not denied by the answer. (Rec., 23.)

5. When a premium fell due on December 15, 1883, Wall was sick, and a delay of six days occurred in remitting this premium to the defendant's St. Louis office. Because of this delay, the company

claimed that a forfeiture of the policy had occurred. (Rec., 21, 39.)

6. On January 21, 1884, Wall died. Being notified of the fact, the company denied liability, and thereby waived further proof. (Rec., 39.)

7. The second count of the petition alleges that on December 15, 1883, the policy in question had acquired a net value of $161.05, as computed under the rule provided by the statute of Missouri hereinafter set out, and that this amount, applied and taken as a net single premium for temporary insurance, as required by said statute, continued said policy in force until August 30, 1886, thirty-one months after Wall's death. (Rec., 18.) The evidence shows this computation to be correct. (Rec., 40.)

8. The answer of the defendant admitted that Wall was a resident of Missouri; that the policy was delivered there; and that the defendant was then doing a life insurance business in that State. But alleged that said policy was executed in New York; that the premiums were payable there, unless paid to persons designated by the company to receive them elsewhere, and that the insurance was payable at the defendant's office in that State; and that consequently the policy was subject only to the laws of New York and not within the purview of any statute of the State of Missouri. The answer also alleged that the policy contained a different provision as to the application of past premiums, in case of a forfeiture, than that made by the Missouri Statute, and that in answer to one of the questions in the application for said policy the provisions of that statute were agreed to be waived. (Rec., 23, 24.)

9. On motion of the plaintiff, the matters so pleaded were stricken out (Rec. 28, 32, 33). The opinion delivered by Mr. Justice Brewer appears in the printed record at pages 28, 29, 30. The motion and ruling are based upon the grounds that the policy in suit was subject to the provisions of the Missouri statute and that the alleged waiver of these provisions was void, because contrary to the terms of this statute and to the local public policy evidenced thereby. The answer also claimed that the policy had become forfeited by the failure to pay the premium due December 15, 1883, by force of a provision that "if any premium on this policy shall not be paid when due, this policy shall be void."(Rec., 17, 38).

The judgment was for the plaintiff for the amount of the policy, with legal interest less the amount of the premium forborne.

STATUTORY PROVISIONS.

The statute of Missouri mentioned in the pleadings was enacted in 1879. It was entitled "An Act to *control* the forfeiture of life insurance policies." (Session Acts, 1879, p. 130). It has been carried into the successive revisions of the statutes of that State had in 1879 and 1889, and now appears as sections 5856, 5857, 5858 and 5859 of the Revised Statutes of 1889. (Vol. 2, pp. 1385, 1386).

These sections are as follows:

SEC. 5856. No policy of insurance on life issued by any life insurance company authorized to do business in this State, on and after the first day of

August, A. D. 1879, shall, after payment upon it of two full annual premiums, be forfeited, or become void by reason of the non-payment of premium thereon, but it shall be subject to the following rules of commutation, to-wit: The net value of the policy, when the premium becomes due and is not paid, shall be computed upon the American experience table of mortality, with four and one-half per cent. interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured, at the time of default of premium and the assumption of mortality and interest aforesaid; but if the policy shall be an endowment, payable at a certain time, or at death if it should occur previously, then if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium for a pure endowment of so much as such premium will purchase, determined by the age of the insured at date of defaulting the payment of premium on the original policy, and the table of mortality and the interest as aforesaid, which amount shall be paid at the end of the original term of endowment, if the insured shall then be alive.

SEC. 5857. At any time after the payment of two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal

holder of the policy may demand of the company, and the company shall issue, its paid-up policy, which, in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the actuaries' or combined experienced table of mortality, with interest at the rate of four per cent. per annum, without deduction of indebtedness on account of said said policy, will purchase, applied as a single premium upon the table rates of the company; and in case of a limited payment life policy, or of a continued payment endowment policy, payable at a certain time, or at death, it shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such annual premiums stipulated to be paid; *provided*, that from such amount the company shall have the right to deduct the net reversionary value of all indebtedness to the company on account of such policy; and, *provided further*, that the policy-holder shall, at the time of making demand for such paid-up policy, surrender the original policy, legally discharged, at the parent office of the company.

SEC. 5858. If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in Section 5856, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding: *provided however*, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured; and,

provided also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent. interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid.

SEC. 5859. The three preceding sections shall not be applicable in the following cases, to-wit: If the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy to non-forfeitable paid-up insurance for which the net value shall be equal to that provided for in Section 5857, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this act shall not be applicable.

There are a number of other provisions which indicate in what sense the phrase "insurance company authorized to do business in this state," is used in the Insurance Law of Missouri. These were all in force when the law of 1879 was enacted, and appear in the Revision of 1889 as follows:

SEC. 5825. "Any life insurance company now or hereafter organized under the laws of this State, or any life insurance company *doing business in this State*, may" make certain special deposits with the superintendent of insurance etc. (p. 1376).

SEC. 5837. "Any insurance company organized under the laws of this State *or doing any business* mentioned" in another section, (life and accident insurance), may change securities deposited with the Superintendent etc. (p. 1379).

SEC. 5839. "It shall be the duty of (certain named officers) of every life assurance company organized under this article, or under the laws of this State, or any such company incorporated by or organized under the laws of the United States or any other State, and *doing business in this State,*" to make certain annual reports of its condition etc. (p. 1380).

SEC. 5843. "It shall not be lawful for any company, organized or incorporated under the laws of the United States, or of any other State, *to transact any business in this State,*" without first making certain deposits (p. 1382).

SEC's. 5844, 5845 and 5846 require a foreign company to file certain statements to its financial condition before it "*shall transact any business in this State.*" (pp. 1382, 1383).

SEC. 5910 requires every company to obtain a certificate that it has complied with the requirements of "the insurance law of this State" before transacting any business therein. (p. 1405).

SEC. 5911 prohibits any company from doing business until it has complied with all the requirements of the local law.

SEC. 5912 requires a foreign company "desiring to *transact any business in this State*" to file a power of attorney authorizing service of process to be made upon it through the state superintendent of insurance. (p. 1405).

SEC. 5914 prohibits persons from acting on behalf of "any company doing business in this State" which is insolvent. (p. 1406).

BRIEF.

I.

By its terms, Section 5856 applies to every policy "issued by any life insurance company authorized to do business in this State." The defendant admits itself to be within this description; and that the language quoted was intended to include non-resident companies is clear from the other sections cited, which indicate the meaning of the phrase "any company authorized to do business in this State." In 1875, the Supreme Court of Missouri construed this phrase to include companies formed under the laws of another State, and held that "all companies are embraced, whether home or foreign, that are doing the business designated." The same view was expressed by the St. Louis Court of Appeals in 1876.

State vs. Beazley, 60 Mo., 220, 223, 224.
Price vs. St. Louis Ins. Co., 3 Mo. App. 262, 267, 268.

So that when the Act of 1879 was passed, the language used had received a judicial construction to the effect that it covered policies issued by foreign companies. This construction thus became a part of the statute. (Easton vs. Courtright, 84 Mo. 27,

34.) The defendant continued to "do business" in Missouri, and hence did so subject to her laws. Indeed, unless the defendant was "authorized to do business in" that State, its contracts were void, in so far as they conferred any rights upon the company. Of course, they were good, *as against the defendant*, on the score of estoppel; by force of which defendant could not be heard to assert its own violation of the statute, nor to say that it was *not* doing business in Missouri.

McCutcheon vs. Rivers, 68 Mo., 122.
American Ins. Co. vs. Smith, 73 Mo., 370.
Aetna Ins. Co. vs. Harvey, 11 Wis., 394, 397.
Brooklyn Ins. Co. vs. Bledsoe, 52 Ala, 358, 551.
Runyan vs. Coster, 14 Pet., 122, 129, 130.

The power of the State to enact this statute rests upon grounds that are now beyond cavil. The defendant had no absolute right to do business in Missouri. It could do so only by permission of that State. When it availed itself of the privilege extended, it became subject to the conditions annexed and to the regulations governing the exercise of that privilege, and is conclusively presumed to have acceded to them.

Paul vs. Virginia, 8 Wall., 168, 181.
Bank of Augusta vs. Earle, 13 Pet., 519.
Ins. Co. vs. French, 18 How., 404, 407.
Ducat vs. Chicago, 10 Wall., 410.

Doyle vs. Ins. Co., 94 U. S. 535, 540, 541.
Phila. Fire Ass'n. vs. New York 119 U. S., 110, 117, 118.
Fritts vs. Palmer, 132 U. S., 282, 288.
Reichard vs. Ins. Co., 31 Mo., 518.
Ehrman vs. Ins. Co., 1 McCrary, 123, 127, 128, 129.
Milnor vs. Railroad Co., 53 N. Y., 363, 367.

The contention that this is purely a New York contract and that the *lex loci contractus* excludes the application of the Missouri law, is unsound. Here, the application was made in Missouri. There the assured resided and died. The policy was delivered to him in that State. He paid his annual premiums to the local agent of the defendant, and through that agent the correspondence subsequent to Wall's death was conducted. That the policy was signed in New York, and that, in case of death, payment was to be made in that State, do not change the place where the contract was made. "The polices do not take effect, are not executed contracts, until delivered by the agent in Virginia. They are, then, local transactions and governed by the local law."

Paul vs. Virginia, 8 Wall., 168, 183.
Phila. Fire Ass'n. vs. New York, 119 U. S., 110, 118.

In 1874, the Legislature of Missouri enacted, in general terms and without any descriptive phraseology including foreign companies, that "no misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material, or render the policy void, unless the matter represented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury." (2 Rev. Stat., 1889, §5849, p. 1384,) Foreign companies claimed exemption from the effect of that statute on grounds similar to those urged here. Judges Dillon and Treat, however, held against this claim, and that as to all policies delivered after the law went into effect, "the act is to be treated as incorporated therein;" and also that "the application having been made in Missouri, and the policy delivered and premium paid there, it was a Missouri contract."

Chance vs. Ins. Co., unreported, but referred to in 4 Dill., 179, 180.
Lovell vs. Ins. Co., 3 Cent. L. J., 699.
White vs. Ins. Co., 4 Dill., 177, 182.
Fletcher vs. Ins. Co., 13 Fed. Rep. 526, 528, 529.

The case of Fletcher vs. Ins. Co., came to this court, where it was decided upon objections to the instructions. But in the statement of the case, prepared by the learned justice who delivered the

opinion, (528), it was stated, referring to a company located in New York, which issued a policy to a citizen of Missouri, that "of course, with reference to the business done in that State, it is subject to her laws," (519); and the opinion proceeds upon the recognition of this statement, and recognizes that the insured became entitled to certain matters "by virtue of the statute of Missouri." (529.)

New York Life Ins. Co. vs. Fletcher, 117 U. S., 519.

These views have been universally applied in all similar cases. The contract is treated as made where the policy is delivered to the assured and accepted by him. It is then issued, and treated as if the local statute were written in it as part of its terms.

Ins. Co. vs. Elliot, 7 Sawy. C. C. 17, 20, 21.
Thwing vs. Great Western Ins. Co., 111 Mass., 93, 109.
Morris vs. Ins. Co., 120 Mass., 503, 506.
Holmes vs. Insurance Co., 131 Mass., 64, 66.
Kennebec Co. vs. Augusta Ins. Co., 6 Gray, 204, 208.
Todd vs. Ins. Co., 11 Phila., 355.
List vs. Commonwealth, 118 Pa. St., 322, 327.
State vs. U. S. Accident Assn., 67 Wis., 624, 629.
Stanhilber vs. Mutual Mill Ins. Co. 76 Wis., 285, 290.
Mobile Ins. Co. vs. Coleman, 58 Ga., 251, 256.

Pace vs. Pace, 19 Fla., 438, 450.
Brooklyn Ins. Co., vs. Bledsoe, 52 Ala., 538, 551.
Rippstein vs. Ins. Co., 57 Mo., 86, 87.
Queen Ins. Co. vs. Leslie, 24 N. E. Rep., 1072, 1073, (Ohio.)

The matter was well stated in the Holmes case, *supra*, as not being so much a question where the contract was made, but that "*the point is, that by accepting the permission given by the statutes to do business in this commonwealth, the defendant became bound by the condition attached to the privilege, that all policies issued by it to residents of this commonwealth should be subject to the provisions of the statute.*"

Holmes vs Ins. Co., 131 Mass., 64, 66.

The official report of the State Superintendent of Missouri discloses that in 1879, when the Non-Forfeiture law under consideration was first enacted, the life insurance in force in that state was:

In Missouri companies, 1,608 policies, insuring $2,529,938.40.

In companies of other States, 16,227 policies, insuring $41,580,963.23.

In 1889, when the statutes were last revised and when the law was continued without amendment, the account was:

In Missouri companies, 1,258 policies, insuring $1,962,394.

In companies of other states, 27,751 policies, insuring, $84,542,942.

In view of these facts, it is not to be presumed that it was intended that the statutory rule should be applied only to home companies; that the comparatively small amount of business done by them should be controlled by legislation, and that companies of other States were to be unrestricted in the provisions of forfeiture they might see fit to insert in their policies.

Morris vs. Penn Ins. Co., 120 Mass., 503, 506.
Holmes vs. Charter Oak Ins. Co., 131 Mass., 64, 66.
Queen Ins. Co. vs. Jefferson Ice Co., 64 Tex. 578, 581, 582.

If its own counsel has correctly construed the form of application in use by the defendant and the policy issued by it, it is quite clear that the purposes in preparing these instruments were, to evade the statutes of the state of Missouri; to do business there without being subject to the local law regulating the matter; and to attempt to "disguise the real character of the transaction." In such a case, the contract could not lose its character as one made in Missouri by any clauses inserted to that end.

Miller vs. Tiffany, 1 Wall., 310.

The entire argument of the plantiff in error on this branch of the case is based upon the assumptions of fact recited on pages 35 and 36 of its brief. In at least two decisively important respects, these assumptions are erroneous. In paragraph 5, page 36, it is assumed that the delivery of the policy in Missouri was nothing "more or other than the *manual transmission* of the paper itself." It is argued from this that the policy was in fact delivered in New York. This is a distortion of the plain meaning of the petition. That pleading alleged that "the said policy was *delivered*" in Missouri; (Rec., p. 18), and the defendant's answer averred that the policy "was transmitted to the State of Missouri, *and was delivered to said Wall in said State.*" (Rec., p. 23.) Neither of these allegations mean a mere "manual transmission of the paper itself." Both of them locate the delivery of the instrument evidencing the contract in the State of Missouri.

The other error is in the same paragraph, that "it was neither averred nor proved that either of the three premiums admitted to have been received by the society was paid elsewhere than at its office in the City of New York." (Brief for P. E., p. 36; also p. 41.)

Certainly, the petition clearly states that Wall was a resident of Missouri, "*in which State the said premiums* (*for* 1880, 1881 *and* 1882) *were paid.*" (Rec. p. 18.) And the answer of the defendants in terms admits the payments, (Rec. 25), and, by failing to deny, admits the place of payment as averred by the plaintiff.

With these corrections, the basis of the argument made on pages 40 and 41 is destroyed. Strictly speaking, the contract between the parties was complete before the policy was ever issued. By reference to the application, (Rec., p. 36), an agreement will be found: "It is hereby declared and agreed that all the statements and answers written on this application are warranted to be true and are offered to the society as a consideration of *the contract, which shall not take effect until the first premium shall have been actually paid* during the life of the person herein proposed for assurance." The natural meaning of this is that *the contract shall take effect upon the payment of the premium, if the assured is then alive.* Hence, the assured paid the premium December 15, 1880, *in Missouri*, (Rec. p. 18), where the application was signed and dated. (Rec., p. 35.) Taking the defendant's own clause, so much relied on, a binding contract was made between the parties *in Missouri*, eight days before any policy was issued, which could have been enforced if no policy had ever been written up.

In re Insurance Co., 22 Fed. Rep., 109, 111.

The idea that because the insurance was payable at the defendant's New York office, that city became the place of performance of the contract, overlooks the fundamental characteristic of a life insurance policy. The portion of the contract which called for acts of performance was that requiring premiums to be paid annually by the assured. The

defendant was doing business and maintaining an office and agent in Missouri, (Rec., 18, 38, 39), and the premiums in 1880, 1881 and 1882 were paid in that State. As the receipt for the premium was required to be countersigned by the Missouri agent to be of any validity, it is very clear that so far as this contract has been performed at all, the place of the performance was the State of Missouri. Distinguished authority has settled that in such circumstances the policy became subject to the laws of that State.

Hamilton vs. Mutual Life Ins. Co., 9 Blatchf., 234, 252.
Manhattan Life Ins. Co. vs. Warwick, 20 Gratt., 614, 623, 628, 638, 639.

Considering the nature of the contract and the conditions under which alone the defendant could do business in Missouri, it is self-evidently within the power of that State to prescribe that certain contracts shall not be entered into. Long and well settled rules have established that "a New York corporation cannot enter into a contract with a citizen of Missouri, in the latter state, even by consent of both parties, which shall be governed by the law of New York," (Brief for P. E., p. 49), if the State of Missouri declares to the contrary. And where, confessedly, the law of that State prohibits a local company from making the same contract, every consideration of fairness should move a construction that a foreign corporation shall not enjoy greater privileges. This is especially true where the privilege claimed is

that of setting aside a solemn public statute enacted for the express purpose of avoiding the very forfeiture here sought to be enforced. The legislative power of a State cannot be thus placed at the mercy of a forgein corporation. The oft cited case of Pritchard vs. Norton teaches no such doctrine as that. The fundamental condition upon which the defendant obtained the right to call on Samuel E. Wall in Missouri and solicit a contract of assurance on his life, was that it should permit itself to be sued in that State to enforce its obligations under the policy. And certainly it was bound to perform any judgment which might be rendered against it in such suit. The clause making the insurance payable at its New York office would neither constitute a defense to such a suit nor an excuse for failing to comply with an adverse judgment.

If the presumed intention of the parties is to be sought out it must be remembered that the applicant for insurance in this case was a resident of Missouri, and dealing with a Missouri agent of the defendant; that such agent had no right to solicit or receive this insurance unless the defendant was authorized to do business in that State; that if so authorized it could only be in subordination to the laws of Missouri governing life insurance policies. The assured knowing these facts cannot, therefore be presumed to have had in mind that he was making a New York contract. The defendant's application shows upon its face that it understood that a Missouri contract was under contemplation. The very clause now relied upon as a waiver of the statute under consideration

(Rec., p. 36) refers to the statute of some other State than that of New York, to-wit: the statute of the State in which the contract of insurance is being made. *If the contract was to be a New York contract and governed by the laws of that State why this waiver?* Unless the contract would have been subject to the laws of Missouri, but for this waiver, why insert it at all? Clearly the company thought that if its provisions were not waived, the statute of Missouri would govern the contract. If the waiver was void, (a question that will be hereafter discussed), the clause stood without effect, except to indicate that the company was under the impression that the Missouri statute would ordinarily govern the contract between the parties.

"Illegal and Inoperative Clauses in Insurance Policies," 31 Cent. L. J., 246, 248.

II.

The question just discussed has usually arisen because of some provision in the application or policy, or both, inconsistent with, or undertaking to waive, the statutory provision involved. Hence, whether directly so declared in the opinion or not, the ruling that the policy was subject to a particular statute has generally carried with it, as an inevitable incident or result, the further ruling that the inconsistent provision or waiver was inoperative. The same ruling must be made here.

(*a*) The statute expressly provides that the rule it embodies shall obtain "*anything in the policy to*

the contrary notwithstanding," (§5858), and that "no policies" shall be exempt therefrom. (§5856.) Neither a provision of the policy to the contrary, nor an agreement that the statutory provision shall not apply, can be upheld in the face of the mandate of the law that it shall be of no force. Nor can the alleged waiver contained in the application be given greater force than would be attached to a similar one in the policy. That which would be void in the policy—the executed and perfected contract—because contrary to law, cannot be declared valid because it appears in an application—an unexecuted and unperfected proposal. The unlawful end cannot be accomplished by indirection.

Craig vs. Missouri, 4 Peters, 410, 436.
Kennett vs. Chambers, 14 How., 38, 48 *et seq.*

In this instance, the application is merged in the policy, and has force and vitality only because the policy provides that it shall be a part thereof. The application was a mere proposal. If the applicant accepted the policy when tendered, the contract between the parties was made and evidenced. The precedent application would be without further force unless the policy provided for its continued validity. The application here in question was so continued as a part of the policy, and for that reason alone did it survive a merger into the actual contract. Hence, a statute declaring void a given provision if inserted in the policy, annulled as illegal the attempted circum-

vention of the statute in the 27th question of the application.

(b). The same conclusion follows by considering the question upon the broader ground that the statute involved embodies a principle of public policy. Consequently it is beyond the right of private persons to contract it away. *Privatorum conventio juris publico non derogat*, is the maxim.

Cox vs. Railroad Co., 63 N. Y., 414, 421.

The matter of regulating the force and effect of insurance policies has been the subject of legislation in most of the States, and the character of the statutes enacted has been carefully considered by many courts. It has always been remembered that in making a contract of insurance the parties do not stand upon an equal footing. The company prepares an elaborate form of application, consisting of numerous interrogatories. These are framed with great care and oftentimes with skillful cunning. A citizen is asked to insure. He is urged that he owes a duty to his family to do so; is assured that the company represented by the fluent agent insists upon no forfeitures and that its policies are absolutely incontestable. Literature is furnished him showing advantages and sounding praises. When he succumbs to these seductive influences, an application in fine print is produced. Some of the answers may be his own, but most of them are either suggested by the agent or come from the latter entirely. The insured does not understand the professional terms

used. He is told that in order to protect his family and insure them against want in case of his death, by means of one of the advantageous and incontestable policies which has been advertised to him, the formal application produced by the agent should be signed. As a rule, that agent is a trusted friend, who, from his familiarity with the business, is relied on to fill in the answers as may be proper. In due time an elaborately engraved policy arrives, on which a ministering angel protecting and shielding the widow and orphan from want, is the most conspicuous feature. The clauses and conditions on the back of the sheet are in print so fine that the eye is strained to decipher it, and in terms so technical that the average layman cannot appreciate their force. For years, by dint of industry and economy, perhaps even a denial of the comforts of life, the premiums are paid. Then, in a season of crop failure, business embarassment, of sickness or other visitation, the fatal day passes without the payment of a premium. The "fine print" has eclipsed the protecting angel! The incontestable policy which was to shield the family from want has turned into an odious instrument of forfeiture! Instead of bread, the company offers the widow and orphan a stone. The promised shower of blessings consists of Dead Sea fruit, whose sweetness delighted the eye, but which "turned to ashes to the lips." When the policy is accepted, the hope that springs eternal permits no thought of possible failure to pay stipulated premiums. A future of prosperity is counted on. The company calculates upon all these elements,

and no trouble is experienced in obtaining a contemporaneous waiver of protecting statutes and an agreement of forfeiture. It is the same motive in human nature which moves the temporarily embarrassed borrower to agree to waive the usury statutes or his exemptions, or his right of redemption under a mortgage. The State of Missouri, following the lead of the other States, has here very wisely undertaken to interfere with the right of private contract in the greater interest of the public good. This has become as necessary in the matter of insurance contracts as in those of money-lending; probably more so. It is well known that by the payment of successive premiums a policy acquires a moneyed value. By statute, a mode was prescribed to ascertain that value, and its application was directed. If that mode and application could be changed, except as permitted by the statute itself, it could be waived *in toto*. The result would be that if an absolute forfeiture were provided, it would have to be upheld, although the statute said there should be none. A provision would be held valid when the statute said it should be void. The State simply requires that the company shall give the assured the statutory benefit of his premiums paid. The State has an interest in preventing forfeitures, and a still greater interest in guarding against their consequences. The husband, having toiled for years to keep up his policy, at his death his estate stands diminished by the amount so paid out. It is not too much to say, that in many instances, all his annual savings have been invested to secure to the family a

fund for support and education after his death. Thus, poverty and the consequent ills are attempted to be guarded against. The State is not threatened with paupers, and is given the benefit of children educated and supplied with means to start in life and to increase the taxable wealth of the community. Sections 5851 and 5854, Rev. Stat. 1889, pp. 1384, 1385, clearly indicate this purpose. (Commercial Bank vs. Railway Co., 45 Wis., 172, 181, 182.) The state also takes into account the circumstances under which insurance policies are usually issued and the advantages which the company has in the transaction, and protects her citizens from ingeniously worded clauses, not understood by the average layman, as well as against over-confidence in their own ability to pay the maturing premiums and to avoid the coming of evil days. In view of these considerations, Mr. Justice Brewer well said that the Missouri Legislature "evidently intended by its legislation to provide a fixed and absolute rule, applicable to all cases—absolute and universal—because if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing." (Rec., 30.)

Indeed, it is clear that unless the statutory rule was intended to be beyoud change or waiver by private contract, there was no intelligent purpose whatever in enacting it. *If the right of private contract was nevertheless to stand higher than the statute, the entire matter might as well have been left to be*

fixed by the parties. The very purpose of the statute was to abridge this right, where the agreement was made contemporaneous with the issuance of the policy. It is claimed, however, that no negative words are used in the statute indicating such an intent. It is difficult to understand how the statute could have been made stronger. Section 5856 declares that "*no policies shall*, after the payment upon it of two full annual premiums, *be forfeited or become void* by reason of the non-payment of premium thereon, but shall be subject to the following rules of commutation, etc." And Section 5857 provides that "if the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in Section 5856, * * the company shall be *bound to pay* the amount of the policy, the same as if there had been no default in the payment of premium, *anything in the policy to the contrary notwithstanding.*." Positive declarations that no policy shall become void for a given cause, and that anything contained in it, to the effect that it should become so for that reason, shall be inoperative, make quite as strong a negative as our language permits. The meaning is as clearly negative and prohibitory as can be expressed.

This construction is reinforced by considering Section 5859, which provides certain instances when the proceding sections shall not apply; thus, under well-settled rules for statutory construction *excluding all other cases of the non-application* of Section 5856 *and all other means of changing or evading its provisions.* The last section also shows conclusively *when*

the insured may contract without reference to the statute. *After* default, he is presumed to understand his situation and his rights, and to be free to appreciate the force of any contract he may make. By the strongest implication, the privilege of thus contracting being recognized *then*, it is *excluded* at all prior times.

Emery vs. Piscataqua Ins. Co., 52 Me., 322, 326.

A perusal of the Missouri "Misrepresentation Statute," of the provisions requiring foreign companies to permit themselves to be sued in the local courts, and of the section providing that in case total loss by fire the amount written in the policy shall be the measure of liability, will show that they are no stronger in their negative force; and yet all of them have been held to be beyond change or waiver by private contract.

White vs. Connecticut Mutual Ins. Co., 4 Dill., 177, 182, 183.
Fletcher vs. New York Life Ins. Co., 13 Fed. Rep., 526, 528; *S. C.*, 117 U. S., 519.
Reichard vs. Manhattan Ins. Co., 31 Mo., 518, 520.
Reilly vs. Franklin Ins., 43 Wis., 449, 456, *et seq.* (A strong case.)
Thompson vs. St. Louis Ins. Co., 43 Wis., 459, 462.
Emery vs. Piscatoqua Ins. Co., 52 Me., 322, 326.

Queen Ins. Co., vs. Leslie, 24 N. E. Rep., (Ohio), 1072, 1074. (Full discussion.)
Chamberlain vs. New Hampshire Ins. Co., 55 N.H., 249, 264, 265.
Relfe vs. Commercial Ins. Co., 5 Mo. App., 173, 181; *S. C.* 75 Mo., 388.
United State Bank vs. Owens, 2 Peters, 527.
Lloyd vs. Scott, 4 Peters, 205, 228.
Macgregor vs. Railway Co., 18 Q. B., 618, 630.
Oscanyan vs. Arms Co., 103 U. S., 261, 268.

Speaking of these statutes, it has been universally held that they are "founded upon what the legislature regarded a sound public policy." The courts have pointed out the circumstances and influences under which these contracts are usually made, the public sentiment on the subject, and the necessity for control and regulation of the matter. Considering all these things, it has been accepted as a truism that all statutory provisions in the premises are *presumed* to be dictated by public policy, and consequently beyond the pale of private contract.

Seyk vs. Miller's Ins. Co., 74 Wis., 67, 72, 73.
Mobile Ins. Co. vs. Coleman, 58 Ga., 251, 256.
Couch vs. City Ins. Co., 38 Conn., 181, 185.
Morris vs. Penn Ins. Co., 120 Mass., 503, 505.
Holmes vs. Insurance Co., 131 Mass., 64.
National Bank vs. Ins. Co., 95 U. S., 673, 678.

Sheerer vs. Manhattan Ins. Co., 16 Fed. Rep., 720, 722.
Goodwin vs. Massachusetts Ins. Co., 75 N.Y. 480, 491.
Bammersell vs. Brewers' Ins. Co., 43 Wis. 463, 466.
Thompson vs. Citizens' Ins. Co., 45 Wis., 388.
Cayon vs. Dwelling House Ins. Co., 68 Wis., 510, 516.

The policy is to be construed as though the statute were written in it, followed by an express declaration that all other clauses inconsistent with the statutory provisions shall be of no force. Thus the legislative command that the statute shall prevail, "anything in the policy to the contrary notwithstanding," is carried into practical effect.

White vs. Ins. Co., 4 Dill., 177, 182.
Oshkosh Gas Light Co. vs. Germania Ins. Co., 71 Wis., 454, 457.
Emery vs. Piscataqua Ins. Co., 52 Me., 322, 326.

The statute in question is directed at forfeitures, which have ever been regarded with disfavor. This court has said that forfeiture clauses in insurance policies "are often the means of great oppression and injustice." (96 U. S., 242.) Legislation intended to change what a learned court has termed "the odious system of forfeitures existing under the old law," has ever

been deemed to belong to the class dictated by and evidencing the public policy of the State.

Bosler vs. Rheem, 72 Pa. St., 54, 56, 57.
Insurance Co. vs. Norton, 96 U. S., 234, 242.
Insurance Co. vs. Eggleston, 96 U. S., 572, 577.
North Berwick Co. vs. New England Ins. Co., 52 Me., 336, 340.
Seamans vs. Northwestern Ins. Co., 1 McCrary, 508, 511, 513.
Home Ins. Co. vs. Pierce, 75 Ill., 426.

So that this is not a statute made purely for the benefit of a private person, unmixed with any consideration of public policy. To be susceptible of being waived it must be both. That a statute intends or effects a benefit or protection to citizens does not of itself enable such a person to waive it. In a general sense, every statute relating to private rights and private contracts has such a purpose and result. The precise point is, that if an existing mischief or system of oppression or of unjust forfeitures, or other consideration of general good, moved the enactment of a particular statute, that statute is deemed grounded on public policy. This question is one for the decision of the State Legislature, and the courts deem themselves bound to enforce the conclusions of that body. It is not a question whether the particular contract is detrimental to public good, but of the general tendency of such contracts. So, too, the defendant company conclusively accepted this local

policy by doing business in Missouri, and agreed to abide by it, in availing itself of the privilege to do such business with her citizens. The defendant also knew that even if it succeeded in so framing and arranging its contract, that it would ordinarily be deemed to have been made in New York, a suit might be brought upon it in Missouri and that the courts sitting in the latter State, whether on the Federal or State bench, would not enforce the provision as against a resident citizen in the teeth of the prevailing local public policy, and it acceded in advance to such a ruling.

Bank of Augusta vs. Earle, 13 Peters, 513, 589, 594, 597.
1 Chitty on Cont., (11th Am. Ed.), p. 128 note *b*.
Story's Conflict of Laws, (8th Ed.), Sec. 244.
2 Kent's Comm., *458.
Rousillion vs. Rousillion, 14 Ch. Div., 351, 369.
Ewing vs. Bank, 43 Oh. St., 31, 36, 37.
Union Locomotive Co. vs. Erie Railway Co., 37 N. J. Law, 23, 25.
Edgerly vs. Bush, 81 N. Y., 199, 204.
Smith vs. Union Bank, 5 Peters, 518, 527.

The general rules which are here insisted on find support in a multitude of cases involving kindred questions. Statutes against usury; providing for exemptions, rights of redemption, allowance for the maintenance of a widow, and the assignment of in-

surance policies after a loss; requiring written evidence of contracts and promises in certain cases; declaring what constitutes a legal tender; giving stockholders the right to vote as such; forbidding stockholders to be interested in corporate contracts; regulating the liability to employes for the negligence of fellow-servants, and the like; although most of them directly benefit or protect private persons, have all been held so far dictated by considerations of public policy that they can neither be waived, changed by contract, nor evaded by any artifice or device suggested by ingenuity.

Usury Statutes:

Scott vs. Lloyd, 9 Peters, 418, 448.
Mabee vs. Crozier, 22 Hun, 564.
Crane vs. French, 38 Miss., 5[illegible] 530, 532.
Torrey vs. Grant, 10 Sm. & M., 89, 97.
Clark vs. Spencer, 14 Kas., 398, 404.
Bosler vs. Rheem, 72 Pa. St., 54, 56, 57.

Statutory exemptions from seizure for debt:

Kneetle vs. Newcomb, 22 N. Y., 249.
Maxwell vs. Reed, 7 Wis., 582, 591.
Wallingsford vs. Bennett, 1 Mackey, 303, 310.
Branch vs. Tomlinson, 77 N. C., 388, 391.
Curtis vs. O'Brien, 20 Iowa, 376.
Carter vs. Carter, 20 Fla., 558, 563.
Recht vs. Kelly, 82 Ill., 147.
1 Freem. Ex., (2 Ed.), Sec. 216.

While the early Pennsylvania cases are to the contrary, subsequent reflection has induced the admission that they were unsound in principle.

Firmstone vs. Mack, 49 Pa. St., 387, 393.
Shelly's Appeal, 36 Pa. St., 380.

The right to redeem from a mortgage:

Peugh vs. Davis, 96 U. S., 332, 337.
Bayley vs. Bayley, 5 Gray, 505, 510.
Parmer vs. Parmer, 74 Ala., 285, 287, 288.
Quartermous vs. Kennedy, 29 Ark., 544, 547.
Wing vs. Cooper, 37 Vt., 169, 181.
2 Jones on Mortgages, (4 Ed.), Sec. 1039.

Allowance to widow of deceased:

Phelps vs. Phelps, 72 Ill., 545, 548, 549.

The Statute of Frauds:

Shapley vs. Abbott, 42 N. Y., 443, 451, 456, 457.
Habergham vs. Vincent, 2 Vesey Jr., 204, 227.

Assignment of insurance policies *after* loss:

Courtney vs. New York Ins. Co., 28 Barb., 116.

Spare vs. Home Ins. Co., 17 Fed. Rep., 568, 571.
Pennebacker vs. Tomlinson, 1 Tenn. Ch., 594, 601.

Legal Tender Act:

Buchegger vs. Schultz, 13 Mich., 420, 422.
Hastings vs. Johnson, 2 Nev., 190, 198.
Kimpton vs. Bronson, 45 Barb., 618, 632.

Stock-holder's statutory right to vote:

Fisher vs. Bush, 35 Hun, 641, 644.

Statutes regulating an employer's liability for negligence of fellow-servant:

Railway Co. vs. Peavey, 29 Kas., 169, 175.

Statutes forbidding directors to be interested in corporate contracts:

Barton vs. Port Jackson Road Co., 17 Barb., 397, 405.

Miscellaneous:

Hope vs. International Society, 4 Ch. Div., 327, 332, 334.
Lovett vs. King, 16 Ind., 464.

The statute books of the several states abound with enactments against overcharges and discriminations by common carriers and in other businesses, and regulating many other matters connected with their operation. Most of these contain no negative clauses, and nearly all of them have for their immediate object the protection of the individual shipper or customer. The idea that such a person would be bound by a contract variant from the statutory rule, or that he could waive the force of that rule, would be deemed a startling one. The numerous other statutes of a similar character are all inspired by what the legislature deemed an oppressive or unjust mode of doing business or of executing particular transactions. Thus inspired, the statutes voice a public policy and place the enumerated matters beyond private control. Much litigation has also resulted over stipulations by which carriers have undertaken to limit their legal liability. Whenever the public good has been entrenched upon by a particular clause, that clause has fallen under the ban of the courts, and that, too, as a matter of unwritten law and without a statute, but nevertheless upon the broad ground of public policy. In many of these instances, agreements and waivers may be valid *after* the right has accrued, just as section 5859 permits a contract to be made when, *but not before*, a premium is in default, This circumstance is adverted to by the courts as strong proof of an unbending policy against permitting a contemporaneous or prospective waiver.

Kneetle vs. Newcomb, 22 N. Y. 249.

Maloney vs. Newton, 85 Ind., 565, 566.
Shapley vs. Abbott, 42 N. Y., 443, 452.
Greenhood Pub. Pol., pp. 497, 498.

It is to be noted, also, that under the Missouri statute, (Sec. 5854), this policy, though payable to the wife, inured also to the benefit of the children of the assured. These were the wards of the statute, so to speak, when this contract was made, and no waiver on the part of other persons can affect a contract in which they have an interest.

Bucher vs. Commonwealth, 103 Pa. St., 528, 533.
Commercial Bank vs. Railway Co., 45 Wis., 172, 182.

Even if the Missouri statute embodied a harsh rule, the company would have no right of complaint, as it was not legally *bound* to do business in that State. But, in truth, the statutory rule, framed in imitation of the Massachussetts Non-Forfeiture Law, is manifestly just and righteous. The value of the policy is a fund in the hands of the company belonging to the insured. No honest man ought to declare a forfeiture of another's rights while holding such a fund. The statute merely declares that three-fourths of this fund shall be applied to keep the policy in force for a limited period thereafter. This period is ascertained by referring to a standard mor-

tality table and applying the not burdensome interest of 4½ per cent. All indebtedness to the company is required to be paid, and one-fourth of the value of the policy may be retained by it. If the company does not wish to have the funds in its hands so applied, section 5859 permits it to provide in the policy that the value thus ascertained, shall be paid over in cash, and thus end any further liability; or to provide for its application to the purchase of a paid-up policy under the not onerous rule laid down in Section 5857.

Carter vs. John Hancock Ins. Co., 127 Mass., 153, 154, 155.
Greenfield vs. Massachusetts Ins. Co., 47 N. Y., 430, 437.

A prominent company in announcing that it had adopted this plan, said that it "takes the opportunity of expressing the belief there are none others extant more justly liberal; or better adapted to preserve the equities of members." (Report of Penn Mutual Life Ins. Co., on Non-Forfeiture Extension, p. 4.)

To demonstrate the justice of these provisions, and also of the observations we have made upon the general subject, it may not be improper to present a few quotations from the circulars issued by this very defendant for general circulation. Speaking of one of its then recent forms of policy, the company said, "Instead of a long list of arduous and ambiguous restrictions, printed in small type, difficult of inter-

pretation and open to dispute, the back of the policy may, if the applicant desire it, be simply a *sheet of blank paper*. (The italics are the company's.) * * * * * * * * * * After two years, the policy becomes absolutely incontestable. There is no consideration of more importance to the holder of a policy, than the *certainty of payment in full and without dispute*. (Again the company's italics.) The policy is payable immediately upon the receipt of satisfactory proofs of death, thus furnishing ready money for the support of the family, the protection of the estate, or the carrying forward of business. * * * No assurer can tell with certainty at the time he applies for his policy precisely what his circumstances will be 15 or 20 years thereafter. Hence, it may become an inestimable privilege to be able, in the end, to fix upon a settlement which, in the beginning, may not have seemed fitted to his case. * * * Many men fail to assure their lives—either because the whole transaction seems complicated and hard to understand, or because they are afraid that the agreement contained in the policy when they receive it, will differ from the description of the contract given them in advance. * * * Nothing could be simpler than this new policy, and no man, however ignorant, can fail to understand and appreciate its advantages. Moreover, as it is absolutely without arduous conditions, and as the only provisions of the contract are *privileges* and are clearly stated in the *application*, no man need hesitate, lest through inadvertence or a lack of expert knowledge, he should, by assuring his

life, enter into an agreement, the terms of which may ultimately prove unsatisfactory to him, or may differ from his expectation." And in advising its policy holders as to the "*Best Method of Applying Dividends*," a given method was declared to enable these to be "used to continue the policy in force, in seasons of misfortune, when other resources fail." The Missouri statute does no more than to apply the value of the policy to the same end, and partly because of the considerations indicated. This defendant had the choice of having its policy stand subject to either of three provisions. It chose to insert one different from all of them. The legal result was that the policy came under Sections 5856 and 5858. As indicated, the company, in contemplation of law, contracted to carry out the statutory rule thus laid down, and under that rule became liable to pay the amount which the judgment of the court below awarded plaintiff.

The plaintiff in error has classified its reasons why the statute is subject to be controlled by private contract on page 57 of its brief. Concerning this classification, and the arguments based thereon, it may be said:

1 & 3. It has already been pointed out that the statute is negative and prohibitory in its character. It not only forbids a certain provision in a contract, but declares that if such a provision is inserted, the contract shall be enforced under the statutory rule, "anything in the policy to the contrary notwithstanding," and that the company shall "*be bound*" to pay, notwithstanding the illegal provision. The

language and policy of the statute unite in requiring that clauses violative of the rule it declares shall be discarded. In no other way can the statute be given force. A penalty might punish the offender, but would not efficiently execute the statutory mandate. The discussion inevitably leads to the pertinent and decisive inquiry, if the statute was subject to be waived, *if it was intended to be set aside by private contract, why was it enacted at all?*

United States vs. O'Connor 31 Fed. Rep., 449, 451.
Sullivan vs. Oregon Ry., 24 Pac. Rep., 408, 410.
Bullard vs. Bank, 18 Wall., 589, 596.
Shepley vs. Cowan, 91 U. S., 330, 336.

2. If the effect of the statute "is simply to add to the contract set forth in the policy, a further statutory covenant or condition," it can hardly be said that the clause so added shall have no force. When the added clause is inconsistent with the conditions of the policy, which shall yield? Not only the policy which dictated the statute, but its very terms supply the answer.

4. The effect of the statute is to make the new contract one for "temporary insurance," that is, insurance for a limited period. At the expiration of that period, if the assured is still alive, there is no *forfeiture*, but simply an end of the contract. It has run its course and the assured and the beneficiary have had the full benefit of the statute. If element

of forfeiture there be in this, it is such an one as the law has not seen fit to declare against. It will not do to say that the statutory rule can be met by substituting a different rule of commutation than those it permits. These rules may vary in the several States, and with each separate company. One purpose of the statute was, that whatever might be the rule elsewhere, or the one adopted by a particular company, the rule in Missouri should be uniform and universal in its operation and effect.

Morris vs. Penn Ins. Co., 120 Mass., 503, 505.
Day vs. Dwelling House Ins. Co., 81 Me., 244, 248.

This conclusion finds strong support in Section 5859. There the *only* instances in which Section 5856 shall not apply, are specifically enumerated. All others stand excluded by the expression of those thus permitted, under a well-known maxim.

The cases of Henry vs. Marksberry and Farmers Bank vs. Harrison, cited by the plaintiff in error, (brief, pp. 58, 59,) support the contention that in so far as the contract varies from the statute, it has no force. The remainder of it is to be enforced between the parties, purged of its illegality.

The idea advanced on pages 61-65 of the brief, that this statute has no different purpose or wider scope than those prescribing rules of practice, or of pleading, to govern in judicial proceedings, exposes the weakness of the argument against us. That a

prisoner may waive a full panel from which to select a jury, or an ordinary litigant estop himself from objecting to informalities in taking of depositions, does not prove that a contract which a statute, by the strongest implication, (to say the least) forbids, is nevertheless valid, nor that there is no such maxim as "*jus publicum privatorum pactis mutari non potest.*"

A defendant may permit a judgment to be rendered against him by default, or a prisoner enter a plea of guilty, and thereby waive many things. But *if an executory agreement in advance* of the accrual of a cause of action or of the commission of crime to do either of these things, were urged as a waiver of his right to the trial which a defendant demanded, the authorities would doubtless declare that such a waiver contravened the policy of the law.

Cancemi vs. People, 18 N. Y., 128, 137.
State vs. Mansfield, 41 Mo., 470, 476, 478.
Hill vs. People, 16 Mich., 351, 357.

The argument, (pp. 61, 62, 65), based on the rulings of the Missouri Supreme Court in Ridgeway vs. Holliday, Stiles vs. Smith and Orr vs. Rode, upon the question of pleading the statute of limitations is equally unfortunate. For it has been distinctly and consistently held, in a long line of cases, that where the effect of the statute is "to extinguish the title of the former owner and to confer it upon the adverse possessor," the statute of limitations need NOT

be pleaded, but that a title thus acquired under it can be shown under *a general denial.*

Nelson vs. Brodhack, 44 Mo., 596, 599, 600 *et seq.*
Fulkerson vs. Mitchell, 82 Mo., 13, 20, 21 and cas. cit.
Fairbanks vs. Long, 91 Mo., 628, 631.
Holmes vs. Kring, 93 Mo. 452, 454.
Stocker vs. Green, 94 Mo., 280, 283.
Spencer vs. O'Neill, 100 Mo., 49, 52. ("Answer a general denial.")

The only other analogy urged by the plaintiff in error, (brief, 66, 67), is that the "right or privilege (given by the Missouri Statute under consideration) corresponds to those secured to debtors by statutes exempting homesteads and other specified property from execution." This analogy is *literally and precisely correct.* The same rule that governs the validity of waivers of such rights will decide the question here involved. But the assertion of learned counsel that a waiver of the "corresponding" right mentioned can be sustained, is erroneous. We have already cited a long list of authorities, following the well-considered case of Kneetle vs. Newcomb, 22 N. Y., 249, to the effect that such waivers are *void.*

The Pennsylvania cases cited by counsel (p. 67) are admitted to be wrong in principle by the very court which decided them.

Firmstone vs. Mack, 49 Pa. St., 387, 393.
Shelly's Appeal, 36 Pa. St., 380.

And the Indiana cases cited only decide that *after* an execution has been levied on property exempt, the defendant may waive the claim which the statute anthorizes him to make. This is far different from a *prospective* waiver, and more like the surrender of a policy *after* default, as authorized by Section 5859.

Surely, it is asking too much that a long line of well considered cases shall be discarded for the sake of cases discredited and inapplicable. And if all the analogies which the research and ingenuity of counsel can present are found to have been decided *against* the waiver claimed, how can such a waiver be upheld in this case? The failure of the analogies, the chosen ground of the defendant, must destroy the contention its counsel urge. If no other executory agreement to waive what are called "corresponding" provisions can be held valid, why should the one at bar be deemed a signal exception?

It is true that Section 5859 is entitled to important consideration in determining this case. That section exempts a policy from the operation of Sections 5856, 5857, and 5858 in four specified instances and *in none others*. If the policy contains either of two provisions, or, if *after default* the legal holder of the policy shall exchange or surrender it, the transaction is valid. Unless it is void in all other instances, what becomes of the canon for statutory construction, *expressio unius* etc.?

The two provisions which the policy is permitted to contain are in the line of the statutory command that insurance companies shall treat policy-holders fairly, and indicate in the most positive manner that

considerations of public policy prompted the enactment. The legal effect is precisely the same as if it had been provided, in layman's language, that every policy must contain one of the two provisions mentioned in Section 5859; otherwise, it will be construed as though the three preceding sections were written in it, "any other provision of the policy to the contrary notwithstanding." Considering Section 5859, an additional reason is presented for the inquiry, *if these provisions if the statute were intended to depend upon the consent of the company and the assurer for efficacy, why were they enacted at all?* Under the argument presented by counsel, the statute would only apply where the policy was silent on the subject, (which has never been the case and is practically impossible), or where the parties expressly agreed that the statute should be a part of the policy. In the latter aspect, it was an unnecessary enactment, and if, notwithstanding its terms, a different contract might still be made, its presence on the statute-book is worse than mockery and pointless verbiage. The sound view of the matter is that indicated by Judge Brewer in this case, that the Legislature of Missouri intended that whatever the rule might be elsewhere, or with given companies, all policies issued by companies availing themselves of her permission to do business within that State, should be subject to the statutory rules.

Morris vs. Penn. Ins. Co. 120 Mass., 503, 506.

Section 5859 is not found in the Massachusetts

Non-Forfeiture Law, (Pitt vs. Berkshire Ins. Co., 100 Mass., 500, 501, note.) Whatever question might be made upon the Massachusetts statute as to the right of a company to substitute an equally fair and equitable rule of commutation, the Missouri Legislature declined to leave the question of comparison an open one. Although it followed the Massachusetts law closely in Section 5856, it decided that *it* would prescribe what should constitute a legal equivalent for the statutory rule of temporary insurance, and that it would *not* permit the laws of any other State, nor the policy provisions of any company, to do so. To try each case, as it arises, upon the issue whether the clause substituted in the policy under consideration was equitable and adequate, would produce endless confusion and create *doubt* where the State intended *certainty*. It cannot be supposed that the statute contemplated that each case should turn upon the verdict of the jury, or the discretion of a chancellor, whether the particular arrangement was such as should be sustained And if the Massachusetts statute was open to ~~this~~ evasion, it was manifestly intended that the Missouri law should *not* be. The companies were plainly told that if they preferred not to be subject to the rule of temporary insurance prescribed by Section 5856, they might adopt the "unconditional cash surrender" or "the unconditional commutation" mentioned in Section 5859. And the State also said with firmness, but in no ungenerous spirit, that if a foreign company did not care to do business within her limits on those terms, it should not do so at all. This defendant adopted a clause different and more favorable to it, *under any*

state of affairs, than that permitted by statute. It must inevitably follow that Section 5856 applied to its policy, and if the 27th clause of the application meant anything it was the defendant knew this fact.

The last two alternatives of Section 5859 disclose the *only* instances in which a policy-holder can waive the rule laid down in Section 5856, namely, "*after default of premium.*" He may then surrender his policy for another form or upon any other consideration satisfactory to him. And it is literally and precisely true that the difference between an executory or precedent waiver, and a new contract after default has occurred, does exist. More than that, the difference is such that it characterizes the statute as one which cannot be waived in the former manner; it also stamps the act as grounded on considerations of public policy; and it serves to further emphasize the analogies of the cases cited. In a number of them the distinction between an executory or contemporaneous waiver and a subsequent contract, (denied by counsel, brief, 68, 69,) is pointedly drawn. An execution creditor may surrender property exempt from seizure to the officer, (subject only, in some States, to a statutory interest of the wife, or minor children), or he may lose his right to exemptions by failing to claim them; but these circumstances instead of constituting arguments in support of such a waiver as is here presented, serve to emphasize the decisive distinction already noted and the grounds upon such a waiver is held to be without validity.

Harper vs. Leal, 10 How. Pr., 276, 283, 284.

Counsel seem to think that if this defendant should fail in its effort to exact a waiver which the law will not enforce, it may be subjected to a fraud. There is a suggestion of the humorous in this. The policy sued on is numbered 227,711. A sufficient number of these had been issued and were in force in Missouri to justify the defendant in maintaining an office and agent in that State. The court will doubtless judicially know that this company is one of the largest in the world. Its own advertisements need not be scanned to learn this, nor the further fact that it claims to be managed with intelligence and skill. And, despite all these, and other pertinent considerations, if, forsooth, it cannot succeed in enforcing an illegal provision in one of its policies, it will stand defrauded! And that too, when it inserted the provision for the manifest purpose of evading and circumventing a solemn public statute! Nor should it be forgotten that the party who is sought to be estopped from imposing upon this defendant was at the time of signing the application a *married woman*, who could neither be estopped by a mere contract nor bound by a warranty! There is no moral wrong in refusing to be bound by a contract ostracised by the law. The facts connected with insurance contracts which the courts have judicially noticed are such that there can be no room for even the suggestion of unfairness against a widow who is simply asking that which the Legislature said should be hers, despite any clause in the company's contract intended to deprive her of it! She simply stands upon the contract as purged of its illegal provisions. There is no element of estoppel in the case.

"There was no fact involved in the transaction of which the defendant was ignorant; and it must be presumed to have known the law and the legal effect of the agreement."

Crawford vs. Lockwood, 9 How. Pr., 547, 551

Wherefore, the judgment of the circuit court should be affirmed.

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Kansas City, Mo., April 10, 1891.